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No. 307

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

LOUISIANA PUBLIC SERVICE COMMISSION,
Petitioner,

v.

FEDERAL POWER COMMISSION, UNITED GAS PIPELINE COMPANY, WILLMUT GAS AND OIL COMPANY, *Respondents.*

APPENDIX

(Volume II)

of

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

DOCKET NO. CP62-161

UNITED GAS PIPE LINE COMPANY

PRESIDING EXAMINER'S INITIAL DECISION ON A PETITION FOR DECLARATORY ORDER TO DETERMINE JURISDICTION

(Issued February 25, 1963)

APPEARANCES

For United Gas Pipe Line Company: Vernon W. Woods, C. Hoffman Lewis, W. O. Crain.

For Willmut Gas and Oil Company: Thomas M. Knebel, Watkins & Rea.

For Texas Gas Transmission Corporation: George J. Meiburger, Christopher T. Boland, Robert O. Cook, William Feldhaus, Daniel O'Connell.

For Louisiana Attorney General and Louisiana Public Service Commission: Joseph H. Kavanaugh, Jack Gremillion.

For Louisiana Gas Service Company: Walter J. Suthon, III, Andrew P. Carter.

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For Hammond-Baton Rouge Brick Company, et al.: Tom H. Matheny.

For the Staff of the Federal Power Commission: Harwood G. Martin.

ZWERDLING, PRESIDING EXAMINER: On January 8, 1962, United Gas Pipe Line Company (United) filed a Petition for Declaratory Order under Section 16 of the Natural Gas Act and Section 1.7(c) of the Regulations thereunder, requesting that the Commission determine a question of jurisdiction regarding certain gas sales made by United in the Jackson District of Eastern Louisiana. The sales in question are made in that part of the State of Louisiana lying north of Lake Ponchartrain and east of the Mississippi River, an area known as the Florida Parishes of Louisiana. Such sales are made to the communities of Kentwood, Roseland, Greensburg, Montpelier, Amite, Independence, Natalbany, Hammond, Ponchatoula, Madisonville Mandeville, Franklinton, Bogalusa, Covington, Abita Springs, Pearl River, Doyle, Livingston, Walker, Port Vincent and Slidell. By order issued April 13, 1962, the Commission granted United's petition for Declaratory Order and set the jurisdictional question for hearing.

The jurisdictional controversy presented here arose as follows. All of United's sales for resale made in its Jackson District, including those in the Florida Parishes area, are regulated by the Federal Power Commission and have never been regulated by any other agency. All of United's sales for resale made in its New Orleans District are regulated by the Louisiana Public Service Commission. On November 2, 1954 the Commission issued Op. No. 277 (13 F.P.C. 398) approving a settlement in a *United* rate proceeding (Docket Nos. G-1142, *et al.*). The Commission found therein that the sales and services rendered in United's so-called Northern Area, including the Jackson District, were subject to the jurisdiction of this Commission, while the sales and services rendered in United's so-called Southern area, including the New Orleans District, were not subject to Commission jurisdiction.

On June 8, 1961 the Louisiana Public Service Commission issued an order directed to United to show cause why United should not be required to charge its intrastate New Orleans Zone rates for all gas sold in the Florida Parishes area of Louisiana. By such order the Louisiana Commission indicated its intention to exercise regulatory jurisdiction over all those sales of United made within the Florida

Parishes area and which were then being regulated by the Federal Power Commission, unless United could show adequate cause to the contrary. On February 5, 1962, after hearing, the

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Louisiana Commission issued its final order directing United to apply within the Florida Parishes area gas rates no higher than those presently authorized within its New Orleans Zone. The rate charged by United to its resale customers in its Jackson District, as regulated and prescribed by the Federal Power Commission, amounts to 33.7 cents per Mcf. The rate authorized by the Louisiana Public Service Commission for gas sold by United in its New Orleans Zone is 24.85 cents per Mcf. Application of the New Orleans Zone rates to United's sales for resale made in the Florida Parishes area in 1961 would have resulted in revenues $304,000 lower than those actually collected by United under its higher FPC-approved Jackson Zone rates. (Exh. 8, p. 14)

United takes the position here that it does not know whether the sales in question are properly subject to the jurisdiction of the Federal Power Commission or the Louisiana Public Service Commission. It emphasizes that it is not interested in advancing the jurisdiction of either regulatory commission over that of the other. However, United notes that it is faced with conflicting orders of two regulatory commissions, which forecast the possible imposition of severe penalties because of its obvious inability to comply with both orders. In order to resolve this conflict it filed the instant petition for a declaratory order to determine the jurisdictional question.

United is engaged in the transportation and sale for resale of natural gas in interstate commerce. It transports by means of its integrated pipe-line system natural gas produced from fields in Texas, Louisiana and Mississippi and delivers and sells it to industrials, other pipelines, and distribution companies in the foregoing States and also in Alabama and Florida.[1]

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[1] Op. No. 277, 13 F.P.C. at 404.

Prior to the year 1951 United's Florida Parish customers located within its Jackson operating district were served gas, some or all of which was produced in the State of Mississippi, which gas was moved through pipelines from that State into the State of Louisiana for resale to such Florida Parish customers. However, during the year 1951 the delivery to these customers of gas produced in the State of Mississippi ceased, and no gas produced in Mississippi has been delivered to them since that time.

Since 1951 all gas sold by United to its customers in the Florida Parishes area has been produced in South Louisiana and in offshore fields located in the Gulf of Mexico. (1:87) The facilities utilized by United

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to transport gas to its Florida Parishes customers are its Napoleonville, Louisiana to Kosciusko, Mississippi 30-inch line and its Lirette, Louisiana to Mobile, Louisiana 14-16 inch line. Out of the total supply of gas introduced into these pipeline facilities (from the fields in South Louisiana and offshore from South Louisiana) United makes deliveries to customers located both within the State of Louisiana and outside the State of Louisiana. Gas is introduced into United's Kosciusko line from production leases located in the Gulf of Mexico on the Continental Shelf, between 15 and 38 miles from the Louisiana shoreline. The gas is transported from its production points offshore to the mainland, being brought on shore in Louisiana at a point northwest of Four League Bay. Thence, it is conveyed northeasterly through United's 30-inch Kosciusko pipeline to the Napoleonville Compressor Station and commingled with gas produced onshore in Louisiana. The gas continues moving northeasterly through United's Montpelier Compressor Station to the Mississippi state line for ultimate sale for resale to customers outside the geographical limits of Louisiana. However, before the gas crosses the Louisiana-Mississippi boundary line, the portions here involved are sold for resale in the Florida Parishes area of Louisiana.

The Florida Parishes area also receives gas from United's Lirette-Mobile pipeline which originates in an

onshore producing area of Louisiana and, following a course eastward of the Kosciusko line, crosses the Louisiana boundary into Mississippi at a point east of Lake Ponchartrain. Shortly after passing under Lake Ponchartrain, but before entering Mississippi, the Lirette-Mobile line supplies certain Florida Parishes communities through a 10-inch lateral which in turn continues northward and eventually joins United's system in the general area southwest of Jackson, Mississippi. It is undisputed that all of the gas transmitted by United in its Lirette-Mobile line enroute to the Florida Parishes area is onshore Louisiana gas.

Testimony introduced by United indicates that on five different occasions, twice during the month of January 1958, once in November 1958, once in May 1959, and once in July 1960, for periods varying from two hours up to 9 or 10 hours, some very small quantities of gas produced in Louisiana and offshore fields flowed back across the Mississippi state line, through the 10-inch line extending north from Bogalusa, Louisiana, after that gas had already been transported across the state line. This backflow extended as far south as Bogalusa and possibly a little further. The United witness had not checked this situation since October 13, 1961, but he testified that he had no occasion to believe there had been any more backflows since that time. (1:27) Although this situation is referred to briefly in the Staff's Statement of the Case at the beginning of its instant brief, the Staff makes no contention that such brief,

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sporadic and accidental backflows occurring prior to 1961 could have any bearing upon the merits of the jurisdictional issue presented in this case.

Although, as earlier noted, the Commission in Op. No. 277 (1954) held that United's sales in its Jackson District (which would include the Florida Parishes area) were subject to the jurisdiction of this Commission, it is important to recognize that this bare conclusion was there expressed in summary fashion, without discussion or analysis of any kind, as part of a decision approving a general rate settlement for United—and that the final result arrived at re-

flected the settlement process, rather than any firm determination based upon principles. One of the problems involved in that *United* rate proceeding resulted from Notices of Cancellation which had been filed by the company with respect to certain sales, based upon United's theory that these sales were intrastate in character and not subject to the jurisdiction of this Commission. On the last day of the G-1142 hearing, when the terms of the proposed settlement were spread upon the record, Staff Counsel summarized the situation with respect to these Notices of Cancellation, noting that United had agreed to move to withdraw certain of the cancellation notices, while certain other cancellation notices were to be made effective by an agreed date. (Docket No. G-1142, Vol. 35, Tr. 3048-9) In expressing agreement to the terms of the settlement, United's counsel stated:

> "The statements with respect to the cancellations were agreeable to United, *and were an integral part of this matter.*" (G-1142, 35:3081; emphasis supplied)

Pursuant to this agreement, Op. No. 277 provided that United would move to withdraw its Notices of Cancellation with respect to certain listed sales, including those in the Florida Parishes area of the Jackson District. In a brief, summary paragraph in that opinion the Commission disposed of the jurisdictional question in the following language:

> "The New Orleans District is divided into New Orleans #5, which United conceives to be intrastate in nature; and New Orleans #6, which is interconnected with its interstate facilities. The Jackson District includes Northwest Mississippi which is not physically interconnected by existing gas transmission pipe lines. The sales and services rendered in United's so-called Northern Area, which includes the Dallas, Shreveport, Monroe, and Jackson districts, are subject to the jurisdiction of this Commission. The sales and services rendered in United's so-called Southern area, which includes the San Antonio, Houston, Beaumont, South-

east Louisiana, and New Orleans districts, are not subject to the jurisdiction of this Commission." (13FPC405)

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It is of interest to note that although the Commission recognized in the above statement that New Orleans #6 was interconnected with United's interstate facilities, as distinguished from New Orleans #5 "which United conceives to be intrastate in nature", the Commission nevertheless expressed the conclusion that all sales rendered in the *entire* New Orleans District were "not subject to the jurisdiction of this Commission". It seems clear that the relevant facts with respect to New Orleans #6 were identical with those involved in the instant proceeding in the case of the sales off United's Lirette-Mobile line to the Florida Parishes area in the Jackson District—in that in both situations all of the gas entering United's Lirette-Mobile line is produced in onshore Louisiana and is sold off United's interstate system for consumption inside the State of Louisiana.

On the other hand it is also of interest to note, with respect to the Commission's Op. No. 277 labeling of the Jackson District sales as jurisdictional, that the instant Florida Parishes area constitutes only a very minor part of the entire Jackson District; that most of the Jackson District lies north of the Louisiana boundary line, comprising the entire State of Mississippi; and that the gas sold by United throughout the State of Mississippi, in the Jackson District, clearly was transmitted from other states and thus admittedly constituted interstate gas.

Under all the circumstances set forth above, it seems clear that the jurisdictional question in Op. No. 277 was treated, to some extent, as the subject of bargaining, as a part of the overall settlement—and that the Commission's summary jurisdictional statement in Op. No. 277 accordingly should not be given any weight in resolving the jurisdictional issue in our instant proceeding.

The instant hearing was held on May 7, 1962. Interveners included Louisiana Gas Service Company, a group

of industrial consumers, and the Louisiana Public Service Commission and the State of Louisiana—hereafter referred to as the Louisiana interveners. Other interveners were Willmut Gas and Oil Company and Texas Gas Transmission Corporation.

The positions of the various parties may be summarized as follows. As already noted, United states that it does not know whether the sales in question are properly subject to the jurisdiction of the Federal Power Commission or of the Louisiana Public Service Commission. However, United's brief concludes that this Commission has jurisdiction over the transportation of gas from the offshore fields to the Florida Parishes area, if such offshore fields are ultimately found to be beyond the seaward boundary of the State of Louisiana. On the other hand, United concludes that gas sold in the Florida Parishes area which is produced in onshore Louisiana, or in offshore fields inside the Louisiana boundaries, is not jurisdictional. The Louisi-

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ana interveners contend that all of the gas sold by United in the Florida Parishes area is non-jurisdictional. The Staff of the Commission and Willmut Gas and Oil Company contend that all of such sales are jurisdictional.

It is concluded here, for reasons set forth at length below, that all of United's sales for resale made in the Florida Parishes area off its Lirette-Mobile line are non-jurisdictional; and that all of United's sales for resale made in the Florida Parishes area off its Kosciusko line are jurisdictional.

I. Sales in Florida Parish Area Off United's Lirette-Mobile Line

As earlier noted, all of the gas transmitted by United in its Lirette-Mobile line enroute to the Florida Parishes area, and all of the gas sold by United off that line in the Florida Parishes area, is onshore Louisiana gas.

In examining the jurisdictional issue with respect to these particular sales, attention will first be directed to

the possible applicability of the Commission's *Lo-Vaca* decision, Op. No. 348 (October 1961).[2] In a letter of December 13, 1961, addressed by the Chairman of this Commission to the Louisiana Public Service Commission, indicating that the instant jurisdictional question might appropriately be determined in a declaratory order proceeding, it was suggested that United's sales of Louisiana onshore gas in the Florida Parishes area, off its Lirette-Mobile line, "may well be governed by the rationale and decision of this Commission in Opinion No. 348 in Lo-Vaca Gathering Company, Docket No. CI60-693 and Houston Pipe Line Company, Docket CP 61-177."

In the *Lo-Vaca* case the gas in question was produced in the state of Texas, and was sold by Lo-Vaca and Houston to El Paso Natural Gas Company in that state. Under the terms of the sales contracts with El Paso, the Lo-Vaca gas was to be used by El Paso solely for fuel in its facilities located outside the state;[3] and the Houston gas was to be consumed by El Paso solely as fuel in the operation of certain facilities in the State of Texas. The Commission held in Opinion No. 348 that, regardless of the terms of the contracts, the gas received by El Paso

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in Texas from Lo-Vaca and Houston would move physically in a commingled stream; that part of such commingled stream (which was bound to include a portion of the Lo-Vaca and Houston gas, regardless of the contract provisions) would move in El Paso's system to other states; that under these circumstances the specific gas sold by Lo-Vaca and Houston would actually in part be resold to customers outside of Texas, and that it would be physically impossible to restrict the consumption of this gas to El Paso's own facilities either inside or outside the state; that accordingly the sale of gas by Lo-Vaca and Houston

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[2] 26 F.P.C. 606 (1961).

[3] In other words under the terms of the contract it was not a sale for resale.

to the El Paso interstate system must be regarded as subject to FPC jurisdiction.

It is of critical importance to note here that in the *Lo-Vaca* case the jurisdictional issue was directed to the sale made by the producers *to El Paso,* and the jurisdictional finding was based upon the Commission's conclusion that *some part* of the gas sold to El Paso under these contracts was bound to move physically as part of the commingled stream in El Paso's interstate line *to other states,* regardless of the terms of the contracts. By contrast, in our instant *United* proceeding the jurisdictional issue is directed to the sale made by United itself, of Louisiana gas, off its Lirette-Mobile line to local distribution companies in the Florida Parishes area, for consumption in that area. The issue is whether *that particular sale* by United is a sale "in interstate commerce". No contention is made, and there is admittedly no possibility that the gas which is the subject *of that sale* by United, or *any part thereof,* will thereafter be transported in interstate commerce outside the State of Louisiana.

It therefore seems clear that we do not have a *Lo-Vaca* situation in the instant proceeding.

On the face of it, the particular sales here involved—of gas produced in the State of Louisiana, transported by United entirely within that state, and sold to local distribution companies off the Lirette-Mobile line in the Florida Parishes area of Louisiana for resale and ultimate consumption there—would seem to fall clearly within the standard, established concept of *sales in intrastate commerce.* Certainly no one would contend here that this particular sale is of gas which as of that time had already "commenced its journey in interstate commerce", as part of "a continuous movement of such gas to an interstate destination". *(Deep South Oil Co.* v. *F.P.C.,* 247 F.2d 882, 888 (CA5, 1957)).

The only basis for the contention that these sales should be regarded as sales *in interstate commerce* is the fact that the gas in question,

while enroute to the Florida Parishes area, is transported on United's interstate pipeline; and the fact that this gas, while so transported to the Florida Parishes area, is commingled with other Louisiana-produced gas which ultimately flows on into other states on the United system.

At the outset, it should be noted that this "commingling" aspect, while seeming at a superficial, uncritical glance to provide a surface similarity with the *Lo-Vaca* case, is nevertheless totally irrelevant to the jurisdictional issue here involved. As already pointed out, the effect of the commingling in the *Lo-Vaca* case was that *some part* of the gas delivered to El Paso under the contracts there involved was physically bound to move as part of the commingled stream in El Paso's interstate line *to other states,* regardless of the terms of the contracts. However, the effect of the "commingling" in our instant *United* case is merely that the gas here in question, sold and delivered off United's Lirette-Mobile line to local distribution companies for consumption in the Florida Parishes area, "kept company" up to that point with gas which continued on into other states. It is difficult to see how it can seriously be thought that the gas in question, under such circumstances, by virtue of merely rubbing shoulders with other Louisiana gas having an ultimate out-of-state destination, could have acquired an "in interstate commerce" character through some process of "guilt by association".

There remains then, as the only possible basis for the contention that the instant sales should be regarded as "sales in interstate commerce", the theory that this gas is transported on and sold off United's interstate system, which is engaged in commerce between different states; that if Louisiana were allowed to fix the rates for United's sale of the instant gas off its interstate system to local distribution companies in the Florida Parishes area, the state's exercise of such jurisdiction *might* have an effect or impact upon United's interstate service. The Staff brief states this position as follows:

"... The sales are in interstate commerce because they are an integral part of a much larger interstate operation, all aspects of which are interdependent, with what happens at any one place in the system necessarily affecting the operations at all others.... the price at which United's gas is sold in Louisiana will affect the just and reasonable prices at which it can sell that part of its overall gas purchases in Mississippi and where Louisiana attempts to force a different rate or service pattern upon the Louisiana portion of the interstate system it is thus not merely adversely affecting interstate commerce in the transportation and sale of gas traveling between Louisiana and the other states on United's pipeline. Instead, in a very real sense, it is regulating sales of gas in interstate commerce assigned by the Natural Gas Act to the exclusive regulatory control of this Commission." (p. 14)

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Although it is recognized here that Louisiana regulation of United's rates for the instant local sales in the Florida Parishes area might conceivably have an effect or impact upon United's interstate operations, that in itself cannot be regarded as a basis for stretching the definition of "sales in interstate commerce" to cover transactions which traditionally have been regarded as intrastate in character.

It could not seriously be contended that any and every operation by a "natural-gas company" *within a state* must necessarily be regarded as an interstate operation, merely because state regulation might conceivably result in a multistate concern, or an interstate conflict of interest.

"... gas pipeline companies can be engaged in both intrastate as well as interstate business and have the intrastate portion not subject to FPC jurisdiction...." *State of North Dakota* v. *Federal Power Commission*, (CA8, 1957) 247 F.2d 173, at 177.

The manner in which situations of this type have been handled by this Commission in the past is strikingly illus-

trated by Op. No. 343, *Kansas-Nebraska Natural Gas Co., Inc.*, 25 F.P.C. 488 (1961), Kansas-Nebraska is a combined production, interstate transmission and retail gas distribution company, transmitting natural gas and distributing it both at wholesale and retail in the States of Kansas, Nebraska, and Colorado. All of its gas sold in Kansas is produced in that state. It is carried north and northeasterly through Kansas on the company's interstate system, with 60 percent of the gas being sold for consumption in Kansas and 40 percent being carried through to Nebraska, where the latter volume is commingled with gas produced in the Julesburg Basin (located in western Nebraska and Colorado) and sold throughout the State of Nebraska. All of the company's sales in Kansas, including its sales for resale, were treated as non-jurisdictional sales, whose rates were regulated by the Kansas Commission. This created certain potential interstate conflicts of interest, which were discussed by the Commission in Op. No. 343 (25 F.P.C. 454). In connection with the allocation of production costs Kansas-Nebraska opposed the "rolled-in" method, under which production costs are allocated to the entire system on a pooled basis, irrespective of the sources of the gas—on the ground that none of the more expensive Julesburg Basin gas was delivered to Kansas customers. The Kansas Commission, as an intervener supported the company approach on the ground that in regulating the company's intrastate rates in Kansas that Commission could not, under Kansas law, charge Kansas customers with the costs for a gas supply located outside the state. The Kansas Commission accordingly contended that if the "rolled-in" method were adopted by the Federal Power Commission in

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connection with its regulation of the company's interstate rates in Nebraska, there would be a resultant conflict between the dual schemes of Federal and state regulation.

The Commission rejected this argument, holding that under the Natural Gas Act it had sole authority and responsibility to determine the interstate wholesale rates of natural gas companies; that the "rolled-in" method was in its

view the most reasonable one; and that the Federal Power Commission could not adopt an allocation method with which it did not agree, simply to permit the State of Kansas to carry out policies of its own. The effect of this decision was that interstate users in Kansas, under state regulation, would be charged with a lower portion of production costs than they would have been required to bear had their rates been determined by the Federal Power Commission under the "rolled-in" method. It is thus clear that the *Kansas-Nebraska* case involved the same interstate conflict of interest situation which is advanced in our instant *United* proceeding as a basis for the contention that United's sales of onshore gas in the Florida Parishes area should be treated as interstate sales, subject to the jurisdiction of this Commission.

The same argument made here to support a finding of jurisdiction could have been made with equal force with respect to the Kansas-Nebraska pipeline system—*i.e.*, that gas produced in the State of Kansas, transported along Kansas-Nebraska's interstate line, and sold off the company's interstate system for resale and ultimate consumption in the same state, should be treated as involving sales of gas "in interstate commerce" in order to avoid a potential interstate conflict of interest. No such contention was made, however, and by common consent of all parties concerned and the Commission itself these particular sales of Kansas-produced gas within the State of Kansas were treated as non-jurisdictional sales, subject to regulation by the Kansas Commission.

If there were any doubt that the instant sales of onshore Louisiana gas by United for resale and consumption in the Florida Parishes area constitute intrastate sales and involve intrastate rates, those doubts must be removed upon a reading of the Supreme Court decisions in two landmark ICC railway cases arising under the Interstate Commerce Act—*Houston and Texas Railway* v. *United States*, 234 U. S. 342 (1914), hereafter referred to as the *Shreveport Rate Cases*, and *North Carolina* v. *United States*, 325 U. S. 507 (1945). The *Shreveport Rate Cases* involved the validity of an Interstate Commerce Commission order, issued

under the Act to Regulate Commerce, which prohibited carriers from charging higher rates for hauling articles from Shreveport, Louisiana into Texas than those charged for intrastate eastward traffic from Dallas and

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Houston, Texas, *on the same line,* for equal distances. Commodity rates fixed by the Railroad Commission of Texas for such intrastate hauls were substantially less than the rates prescribed by the ICC. Accordingly, the commodity rates charged by the carriers from Dallas and Houston eastward to Texas points were less than the rates charged for transportation of the same articles for like distances from Shreveport, Louisiana to Texas. The ICC order was attacked on the ground that Congress had no power to control the intrastate charges of an interstate carrier, and on the further ground that even if Congress did have such power it had not been exercised under the Act. The important point to be noted here is that the Supreme Court in that case treated the intrastate traffic, *hauled on the carrier's interstate line,* as involving intrastate operations and intrastate rates (234 U. S., at 350-357). In a later decision, *Wickard* v *Filburn,* 317 U. S. 111, 123 (1942), the Supreme Court referred to the *Shreveport Rate Cases* as involving "railroad rates of an *admittedly intrastate character.*"[4]

The case of *North Carolina* v. *United States, supra,* arose under the Interstate Commerce Act, which constituted a 1920 revision of the Act to Regulate Commerce. It involved a clash between the North Carolina State Utilities Commission and the ICC, with each claiming the paramount power to fix railroad rates in North Carolina. The State Commission had ordered railroads doing business in North Carolina to charge no more than 1.65 cents per mile for carrying intrastate coach passengers from one point in the state to another. Despite this order, the ICC authorized the same railroads to charge 2.2 cents per mile for the same type of carriage. It was conceded that intrastate coach passengers in general "traveled in the same trains and in the same

[4] Emphasis supplied.

cars," and on the same tracks which carried passengers traveling between two or more states. (325 U. S. 512) The situation thus would seem to be identical with that involved in our instant *United* proceeding, where Louisiana-produced gas which is ultimately delivered to the Florida Parishes area travels in the same interstate line as the balance of the Louisiana-produced gas which is headed for points outside the state. In *North Carolina* v. *United States, supra,* the Supreme Court, however, did not treat the travel of intrastate coach passengers as involving interstate transportation and interstate rates merely because such passengers were carried on the railway's interstate line. The Court noted that as to interstate regulation the ICC under the Act was granted "the broadest powers to prescribe rates", but that "No such breadth of authority is granted to the Commission over purely intrastate rates." (325 U. S. at 510-511) The Court then concluded that the transportation of intrastate coach passengers on the railway's interstate line involved "purely intrastate rates", as to which the ICC had been granted only limited authority to act under an express

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provision of the Interstate Commerce Act authorizing it to prescribe intrastate railroad rates after full hearing and upon findings that state-prescribed rates caused undue discrimination against interstate commerce. The Court then held that the ICC findings in that case were not sufficient to satisfy this requirement, and accordingly the ICC order was set aside.

In a similar reference to this limited grant of authority to the ICC under the Interstate Commerce Act the Supreme Court held in *Florida* v. *United States,* 282 U. S. 194, 212 (1931):

> "The Commission has no *general* authority to regulate intrastate rates and the mere existence of a disparity between particular rates on intrastate and interstate traffic does not warrant the Commission in prescribing intrastate rates." (emphasis supplied)

The Staff's position in the instant case that "where Louisiana attempts to force a different rate pattern upon the Louisiana portion of the interstate system . . . it is regulating sales of gas in interstate commerce assigned by the Natural Gas Act to the exclusive regulatory control of this Commission" (Staff brief, p. 14), amounts to a contention that the mere existence of a disparity between particular rates on intrastate and interstate sales of natural gas warrants this Commission in prescribing what clearly would constitute intrastate rates. But any such position would be totally inconsistent with the conclusion expressed by the Supreme Court in *Florida* v. *United States, supra.*

Once it is concluded here that United's sales of onshore Louisiana gas for resale in the Florida Parishes area are, in fact, *intrastate* sales, a conclusion which seems inescapable in view of the Supreme Court's treatment of like situations in the *ICC railway cases, supra,* then these particular United sales must plainly be found non-jurisdictional in view of the Supreme Court's express holding under the Natural Gas Act in *F.P.C.* v. *Transcontinental Gas Corp.*, 365 U. S. 1, 17 (1961), that:

> ". . . the Commission has no authority over *intrastate sales under any section of the act. . . .*" (emphasis supplied)

It is true that Congress has the *power* under the Commerce Clause of the Constitution to regulate not only interstate operations, but also to regulate intrastate operations which have a subsantial impact or effect upon interstate commerce. As the Supreme Court stated in *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 119 (1942):

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> ". . . The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate

> interstate commerce. . . . The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. . . . It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power."

Similarly, in the *Shreveport Rate Cases, supra,* the Supreme Court stated:

> ". . . It is unnecessary to repeat what has frequently been said by this court with respect to the complete and paramount character of the power confided to Congress to regulate commerce among the several States. It is of the essence of this power that, where it exists, it dominates. . . . By virtue of the comprehensive terms of the grant, the authority of Congress is at all times adequate to meet the varying exigencies that arise and to protect the national interest by securing the freedom of interstate commercial intercourse from local control . . .
>
> ". . . Its authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance. . . . *The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made*

a means of injury to that which has been confided to Federal care.

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Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field. . . ." (234 U. S. 342, at 350-352; emphasis supplied)

However, Congress does not always choose to exercise its power to the full sweep of its authority under the Commerce Clause. The crucial question presented here is whether Congress has in fact exercised any such power under the Natural Gas Act.

In the *Shreveport Rate Cases, supra,* the Supreme Court directed its attention to the *scope* of the power which Congress had granted to the ICC under the Act to Regulate Commerce. The Court noted that the Act contained an unqualified clause of sweeping scope barring undue preferences, as follows:

"Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The Court then held:

"This language is certainly sweeping enough to embrace all the discriminations of the sort described which it was within the power of Congress to condemn. *There*

is no exception or qualification with respect to an unreasonable discrimination against interstate traffic produced by the relation of intrastate to interstate rates as maintained by the carrier. It is apparent from the legislative history of the act that the evil of discrimination was the principal thing aimed at, *and there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach. . . .*" (234 U. S. at 355-357)

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No such contention, of course, could be made with respect to the provision barring undue preferences in Sec. 4(b) of the Natural Gas Act. The Natural Gas Act, by its express terms, applies only to transportation and sales "in interstate commerce" (Sec. 1(b), and *not* to "sales *affecting* interstate commerce". Unlike the sweeping and unlimited prohibition of the Act to Regulate Commerce against undue preferences by common carriers, the prohibition contained in Sec. 4(b) of the Natural Gas Act is expressly made applicable only "with respect to any transportation or sale of natural gas *subject to the jurisdiction of the Commission*"—and is thus limited to the making or granting of undue preferences with respect to *interstate sales*. As the Supreme Court stated in *F.P.C.* v *Transcontinental Gas Corp., supra*, ". . . the Commission has no authority over intrastate sales *under any section* of the Act. . . ." (365 U. S. at 17; emphasis supplied)

The Supreme Court has held that where Congress desires to impose Federal control over intrastate operations, because of their effect upon interstate commerce, Congress does not leave its intent to guesswork or speculation, but uses explicit language to that effect.

This doctrine was the basis for the Court's decision in *Federal Trade Commission* v. *Bunte Bros., Inc.*, 312 U. S. 349 (1941). That case arose under Sec. 5 of the Federal Trade Commission Act, which prohibited "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce . . ." Bunte Brothers, a candy

manufacturer in Illinois, sold products in that state in what the trade calls "break and take" packages, which make the amount received by the purchaser depend upon chance. The Federal Trade Commission found that this enabled the company to compete unfairly in the Illinois market with manufacturers outside the state who could not indulge in this device because the Commission had barred "break and take" packages as an "unfair method of competition." The Commission prohibited Bunte Brothers from further using this device on the ground that it constituted unfair methods of competition under the Act. The lower court held that the Commission had exceeded its power, on the ground that the Act authorized the Commission to proceed only against business practices employed in interstate commerce, and that the transactions in question occurred in intrastate commerce. The Commission contended that its powers were not thus restricted, but that it might also prohibit "unfair mehods used in intrastae sales when these result in a handicap to interstate competitors." The Supreme Court affirmed the lower court's holding that the Commission had acted in violation of the statute, stating:

> "... 'Unfair methods of competition in commerce' are the concern of § 5, and the Commission is 'directed to prevent persons ... from using unfair methods of competition in commerce ...' The 'commerce' in which these methods are barred is interstate commerce. Neither ordinary English speech nor the considered language of legislation would aptly
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> describe the sales by Bunte Brothers of its 'break and take' assortments in Illinois as 'using methods of competition in [interstate] commerce.' *When in order to protect interstate commerce Congress has regulated activities which in isolation are merely local, it has normally conveyed its purpose explicitly.* See for example, National Labor Relations Act, §§ 2(7), 9(c), 10(a), 49 Stat. 450, 453, 29 U.S.C. §§ 152(7), 159(c), 160(a); Bituminous Coal Act, § 4-A, 50 Stat. 83, 15

U.S.C. § 834; Federal Employers' Liability Act, § 1, 35 Stat. 65, as amended, 53 Stat. 1404, 45 U.S.C. § 51 . . ." (at 350-351; emphasis supplied)

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"*. . . This case presents the narrow question of what Congress did, not what it could do. And we merely hold that to read 'unfair methods of competition in* [*interstate*] *commerce' as though it meant 'unfair methods of competition in any way affecting interstate commerce,' requires, in view of all the relevant considerations, much clearer manifestation of intention than Congress has furnished.*" (at 355, emphasis supplied)

Of particular interest in connection with our instant problem is the dissent of Justice Douglas in the *Bunte Bros.* case, supra, where he stated:

"*. . .* An unfair method of competition is 'in' interstate commerce not only when it has an interstate origin but also when it has a direct interstate impact. Respondent is 'using' unfair methods of competition 'in' interstate commerce when the direct effect of its conduct is to burden, stifle, or impair that commerce." (312 U. S. at 356)

As already noted here, in our instant *United* proceeding the contention is made that a transaction which would normally be regarded as intrastate in character should be treated as a sale "in interstate commerce," for the sole reason that the gas in question is carried on United's interstate pipeline and the sale is made off United's interstate system; that if the State of Louisiana is allowed to regulate the rates for these particular sales by United in Florida Parishes area, this might affect the prices at which United could sell the remainder of the gas in the State of Mississippi; that regulation of these Florida Parish rates by Louisiana would therefore have "a direct interstate impact."

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The important thing to note here, however, is that the majority decision of the Supreme Court in the *Bunte Bros.* case, *supra*, rejected in contention in the Douglas dissent that the presence of such a "direct interstate impact" was sufficient to convert a purely intrastate operation into a transaction "in interstate commerce."

The same general conclusion was strongly expressed by the Supreme Court in *Kirschbaum Co.* v. *Walling*, 316 U.S. 517, 521-523 (1942), as follows:

> "Congress may choose, as it has chosen frequently in the past, toregulate only part of what it constitutionally can regulate, leaving to the States activities which, if isolated, are only local. . . . *The history of Congressional legislation regulating not only interstate commerce as such but also activities intertwined with it, justifies the generalization that, when the Federal Government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit and do not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.*"

Similarly, in *Florida* v. *United States, supra*, the Court held:

> "... whenever the Federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear . . ."

The National Labor Relations Act provides an enlightening example of the type of statute where Congress has clearly manifested its purpose to exercise the full sweep of its constitutional authority under the Commerce Clause, and to impose federal control over local operations having a substantial impact or effect upon interstate commerce. Sec. 10(a) of that Act empowers the National Labor Relations Board "to prevent any person from engaging in any

unfair labor practice . . . *affecting commerce.*" Sec. 2(7) declares:

> "The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

In *Polish Nat. Alliance* v. *National Labor Relations Board*, 322 U. S. 643 (1943), the Supreme Court had to determine whether certain practices of a fraternal organization carrying on the business of insurance, whose activities crossed state lines, could be deemed "to affect interstate commerce" and therefore to be within the operation of the National

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Labor Relations Act. The Court answered this question in the affirmative, stating:

> "With negligible exceptions, Congress did not exercise its power to regulate commerce prior to its enactment in . . . 1887 of the Interstate Commerce Act.
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> "Since that time it has frequently chosen, as the Statutes at Large abundantly prove, to regulate only part of what it constitutionally can regulate. Again, half a dozen enactments, other than the National Labor Relations Act, are sufficient to illustrate that *when it wants to bring aspects of commerce within the full sweep of its constitutional authority, it manifests its purpose by regulating not only 'commerce' but also matters which 'affect,' 'interrupt,' or 'promote' interstate commerce.*
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> • • • • • • •
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> "In so describing the range of its control, Congress is not indulging stylistic preferences; it is mediating between federal and state authorities and deciding what

matters are to be taken over by the central Government and what to be left to the States.

* * * * * * *

"And so in this Act, unlike some federal regulatory measures, see *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, 351, 85 L ed.881, 883, 61 S Ct 580; *A. B. Kirschbaum Co.* v. *Walling, supra* (316 U. S. at 522, 523, 86 L ed 1646, 1647, 62 S Ct 1116), *Congress has explicitly regulated not merely transactions or goods in interstate commerce but activities which in isolation might be deemed to be merely local but in the interlacings of business across state lines adversely affect such commerce.*

* * * * * * *

"Congress therefore left it to the Board to ascertain whether proscribed practices would in particular situations adversely affect commerce when judged by the full reach of the constitutional power of Congress. Whether or no practices may be

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deemed by Congress to affect interstate commerce is not to be determined by confining judgment to the quantitive effect of the activities immediately before the Board. *Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce.*" (322 U. S. at 647-8; emphasis supplied)

To the same effect, see *Guss* v. *Utah Labor Relations Board*, 353 U. S. 1, 3 (1957):

"By this language and by the definition of 'affecting commerce' elsewhere in the Act, Congress meant to reach to the full extent of its power under the Commerce Clause."

Also *NLRB* v. *Reliance Fuel Oil Corporation*, decided January 7, 1963 (No. 88, October Term, 1962), where the Supreme Court stated:

> "This Court has consistently declared that in passing the National Labor Relations Act, Congress intended to and did vest in the Board *the fullest jurisdictional breadth* constitutionally permissible under the Commerce Clause. . . ." (Slip Opinion, p. 2)

By contrast, it is clear that in enacting the Natural Gas Act Congress had no intent or desire "to reach to the full extent of its power under the Commerce Clause," or to vest in the Federal Power Commission "the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause." Instead, the Supreme Court has held in numerous decisions that the Natural Gas Act did *not* envisage federal regulation of the entire natural-gas field to the limit of constitutional power; that the overriding congressional purpose was merely to plug the gap in regulation of natural-gas companies resulting from prior judicial decisions which had prohibited state regulation of many of the interstate commerce aspects of the natural-gas business; that although Congress meant to create a comprehensive and effective regulatory scheme, it did *not* desire "comprehensive *federal* regulation"; that the Act was designed to take no authority from State commissions, and was so drawn as to complement and in no manner to usurp State authority.

The Supreme Court set forth its views on this subject at length, and with complete clarity, in *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U.S. 507 (1947). In there holding that state regulation of rates for natural gas transported interstate and sold directly to consumers within the state was not precluded by enactment of the Natural Gas Act, the Court stated:

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> "The two questions may best be considered in the background of the legislative history of the Natural Gas Act and of the judicial history leading to its enactment in 1938.

"Prior to that time this Court in a series of decisions had dealt with various situations arising from state efforts to regulate the sale of imported natural gas. . . . by 1938 the Court had delineated broadly between the area of permissible state control and that in which the states could not intrude. The former included interstate direct sales to local consumers, as exemplified in *Pennsylvania Gas Co.* v. *Public Service Commission,* 252 US 23 . . . the latter, service interstate to local distributing companies for resale, as held in *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.* 265 US 298; . . . reinforced by *Public Utilities Commission* v. *Attleboro Steam & Electric Co.,* 273 US 83 . . ."

* * * * * * *

"This impotence of the states to act in relation to sales for resale by interstate carriers brought about the demand for federal regulation and Congress' response in the Natural Gas Act. To reach those sales and prevent the hiatus in regulation their immunity caused, the Act declared in § 1 (b):

" 'The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale; but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.'

"This section determines the Act's coverage and does so in the light of the situation existing at the time. Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3)

natural gas companies engaged in such transportation or sale.

* * * * * * *

"The line of the statute was thus clear and complete.

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"And the line drawn was that one at which the decisions had arrived in distributing regulatory power before the Act was passed.

"Moreover, this unusual legislative precision was not employed with any view to relieving or exempting any segment of the industry from regulation. *The Act, though extending federal regulation, had no purpose or effect to cut down state power.* On the contrary, perhaps its primary purpose was to aid in making state regulation effective, by adding the weight of federal regulation to supplement and reinforce it in the gap created by the prior decisions. *The Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way.* This appears not merely from the situation which led to its adoption and the legislative history, including the committee reports in Congress cited above, but most plainly from the history of § 1 (b) in respect to the changes which took place in reaching its final form.

* * * * * * *

"*Congress, it is true, occupied a field.* But it was meticulous *to take in only territory which this Court had held the states could not reach.*

* * * * * * *

"The Natural Gas Act created an articulate legislative program based on a clear recognition of the respective responsibilities of the federal and state regulatory agencies. It does not contemplate ineffective regulation

at either level. *We have emphasized repeatedly that Congress meant to create a comprehensive and effective regulatory scheme, complementary in its operation to those of the states and in no manner usurping their authority.*" (332 U.S. at 514-520; emphasis supplied)

To the same effect, see:

Phillips Petroleum Co. v. *Wisconsin*, 347 U.S. 672 (1954):

"There can be no dispute that the overriding congressional purpose was to plug the 'gap' in regulation of natural-gas companies resulting from judicial decisions prohibiting, on federal constitutional grounds, state regulation of many of the interstate commerce aspects of the natural-gas business.

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A significant part of this gap was created by cases holding that 'the regulation of wholesale rates of gas and electrical energy moving in interstate commerce is beyond the constitutional power of the States.' *Interstate Natural Gas Co.* v. *Federal Power Commission, supra* (331 US at 689). The committee reports on the bill that became the Natural Gas Act specifically referred to two of these cases and to the necessity of federal regulation to occupy the hiatus created by them.[18]

"[18] 'The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of congressional prohibition subject to State regulation. . . . There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction. However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example, sales by producing companies to distributing companies) the

legal situation is different. Such transactions have been considered to be not local in character and, even in the absence of Congressional action, not subject to State regulation. (See *Missouri* v. *Kansas Gas Co.* (1924), 265 U.S. 298, and *Public Service Commission* v. *Attleboro Steam & Electric Co.* (1927) 273 U.S. 83). The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act.' HR Rep No. 709, 75th Cong, 1st Sess 1-2; S Rep No. 1162, 75th Cong, 1st Sess 1-2." (347 U.S. at 682-4)

Also see *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 502-503 (1949):

". . . the Natural Gas Act did not envisage federal regulation of the entire natural-gas field to the limit of constitutional power. Rather it contemplated the exercise of federal power as specified in the Act, particularly in that interstate segment which the states were powerless to regulate because of the Commerce Clause of the Federal Constitution. The jurisdiction of the Federal Power Commission was to complement that of the state regulatory bodies. . ."

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Federal Power Commission v. *Transcontinental Gas Corp.*, 365 U.S. 1 (1961):

". . . Congress, in enacting the Natural Gas Act, did not give the Commission comprehensive powers over every incident of gas production, transportation and sale. Rather, Congress was 'meticulous' only to invest the Commission with authority over certain aspects of this field, leaving the residue for state regulation.

* * * * * * *

". . . Congress 'meant to create a comprehensive and effective regulatory scheme.' . . .

"It is true, of course, that Congress did not desire comprehensive federal regulation; much authority was reserved for the States. But it is equally clear that Congress did not desire that an important aspect of this field be left unregulated. . . ."

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Federal Power Commission v. *Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944):

". . . the bill was designed to take 'no authority from State commissions' and was 'so drawn as to complement and in no manner usurp State regulatory authority.'"

In view of the Congressional intent not to usurp or reduce existing state authority or power in this field, but merely to fill the regulatory gap left by prior court decisions, Congress in enacting the Natural Gas Act carefully abstained from making the Act applicable to transportation or sales "*affecting* interstate commerce", and instead limited the jurisdiction of this Commission to transportation and sales "in interstate commerce".

An argument might reasonably be made, along the lines suggested in the instant Staff brief (p. 14), that the comprehensive regulatory scheme would be rendered more effective if the regulatory powers of this commission were extended to cover United's intrastate sales off its interstate system, rather than leaving its intrastate rates to be fixed by the Louisiana Commission. This problem was recognized by the Supreme Court with reference to railway carriers under the Act to Regulate Commerce, when it stated in the *Shreveport Rate Cases*:

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". . . *the power to deal with the relation between the two kinds of rates*[5]*, as a relation, lies exclusively with Congress.* . . . It is for Congress to supply the needed correction where the relation between intrastate and

[5] *i.e.*, interstate and intrastate rates.

> interstate rates presents the evil to be corrected, and this it may do completely by reason of its control over the interstate carrier in all matters having such a close and substantial relation to interstate commerce that it is necessary or appropriate to exercise the control for the effective government of that commerce." (234 U.S. at 354-5)

However, unlike the situation under the Act to Regulate Commerce, Congress has neither indicated nor expressed any intent to deal with any such problem under the Natural Gas Act. If Congress *had* regarded the relation between interstate and intrastate rates for sales of natural gas as presenting a serious problem, it could have vested control over such relationships in this Commission by making the Act applicable not only to transportation and sales of natural gas "*in* interstate commerce", but also to transportation and sales "*affecting* interstate commerce". This, however, Congress did not do—and as earlier noted, the Supreme Court has recognized that

> ". . . the Commission has no outhority over *intrastate* sales under *any section* of the Act . . . ." (*F.P.C.* v. *Transcontinental Gas Corp.*, 365 U.S. 1, at 17; emphasis supplied)

Before concluding this discussion, some reference should be made to the particular argument presented by intervener Willmut Gas and Oil Company. Willmut recognizes as established law that Congress under the Natural Gas Act withheld from this Commission the power to regulate those activities of interstate pipelines which had *not* been held beyond the power of the states to regulate under the Commerce Clause in earlier Supreme Court decisions. However, it is suggested that the problem arises "when an attempt is made to determine exactly what activities were subject to state regulation prior to the enactment of the Act.' Willmut contends that prior to the enactment of the Natural Gas Act the states had no jurisdiction, in view of the Commerce Clause, over *wholesales* of gas to local distributors when made by an interstate pipeline, regardless

of the fact that the gas involved was produced, transported and consumed in one and the same state; that accordingly the Act must be interpreted as subjecting the instant United sales of this character to federal regulation, in order to avoid the regulatory gap which Congress meant to fill in enacting the Natural Gas Act. The Willmut argument is that the question whether sales made by an interstate pipeline company do or do not have an interstate character, precluding interference by the state, is totally unaffected by whether the gas is transported across state lines, but is governed completely *by the nature of the sales—i.e.,* by whether the sales in question are made at *wholesale* to local distributing companies, or *at retail* directly to the consumer.

In presenting this theory, Willmut relies wholly upon a discussion of the general subject in *Missouri* v. *Kansas Natural Gas Co.,* 265 U.S. 298 (1924), including particularly the manner in which the Supreme Court in that case reconciled its decision with earlier decisions in *Pennsylvania Gas Co.* v. *Public Service Comm.,* 252 U.S. 23 (1920), and *Public Utilities Comm.* v. *Landon,* 249 U.S. 236 (1919).

It is concluded here that Willmut has misconceived the significance to be drawn from these cases. The salient points to be noted here are as follows:

1) No question had ever been raised, nor was any presented in the cited decisions, as to the authority of the states under the Commerce Clause to regulate sales by an interstate pipeline company of gas which was produced, transported and consumed wholly in one and the same state—*i.e.,* gas which admittedly had not yet been subjected to interstate transportation at the time when it was sold for consumption within the same state.

2) The court in the above cases was dealing with the only question which was regarded as presenting a problem —*i.e.,* that of gas which had already been transported in interstate commerce by an interstate pipeline company and brought into a given state for sale therein. Under such circumstances, the court held in *Missouri* v. *Kansas, supra,* that:

a) Where the sale in question was one made by the interstate pipeline company to local distributing companies, the interstate movement had not yet come to an end. Accordingly, such sale was still a part of interstate commerce, and beyond the power of the state to regulate. This was the case in *Missouri* v. *Kansas, supra,* where the court stated:

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"The question is controlled by familiar principles. Transportation of gas from one State to another is interstate commerce; and the sale and delivery of it to the local distributing companies is a part of such commerce." (265 U.S. at 307)

b) However, where the local distributing companies, after purchasing the gas from the interstate pipeline company, in turn resold it to the consumers, the interstate movement was regarded as having come to an end with the delivery of the gas to the local distributing companies. Accordingly, the resale by the local companies to the consumers was not regarded as part of interstate commerce, and *was* subject to state regulation. (This was the case in *Public Utilities Comm.* v. *Landon, supra.*)

c) Finally, where an interstate pipeline company transported the gas across state lines and itself sold the gas directly to the consumers in another state, such a sale *was* held to be interstate commerce, *regardless of its retail nature,* in *Pennsylvania Gas Co.* v. *Public Service Comm., supra*:

> "We think that the transmission and sale of natural gas produced in one state, transported by means of pipe lines, and directly furnished to consumers in another state, is interstate commerce within the principles of the cases already determined by this court." 252 U.S. at 26-28.[6]

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[6] Thus Willmut is clearly in error in reading this case as standing for the proposition that "it was the nature of the sales and not the transportation across states lines per se

However, the court stated that in some instances, even where interstate commerce was admittedly involved, the states had authority to pass laws indirectly affecting such commerce, when needed to protect or regulate matters of local interest, and that such laws were operative until Congress acted under its superior authority by regulating the subject-matter for itself; that under the circumstances involved in that case the sale made directly to consumers by the interstate pipeline company, while part of an interstate transmission, was nevertheless local in nature and its regulation by the state was required in the public interest; that accordingly since the regulation of such sales had not yet been attempted under the superior authority of Congress, the state had jurisdiction.

It is difficult to see how the cases cited above could seriously be regarded as standing for the proposition that sales by an interstate pipeline company of gas produced, transported and consumed wholly in one and the same state, which admittedly had not been the subject of an interstate movement prior to such sale, nevertheless are to be considered

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as sales in interstate commerce which the states had no power to regulate.

II. Sales in Florida Parishes Area Off United's Kosciusko Line

Although it is here concluded, for the reasons set forth at length above, that United's sales of onshore Louisiana gas to the Florida Parishes area off its Lirette-Mobile line do not constitute "sales in interstate commerce" and therefore are non-jurisdictional, United's sales to the Florida Parishes area off its 30-inch Kosciusko line present a different problem.

Gas is introduced into United's Kosciusko line from three offshore fields on the Continental Shelf, lying between 15 and 38 miles from the Louisiana shoreline—*i.e.*, Blocks 32,

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which gave the sales their interstate character . . ." (p. 8 of brief)

45, and 110 of the Eugene Islands area seaward of the Louisiana coastline in the Gulf of Mexico. This gas is transported from the production points offshore to the mainland, being brought on shore in Louisana at a point northwest of Four League Bay. Thence, it is conveyed northeasterly through United's 30-inch Kosciusko pipeline to the Napoleonville Compressor Station and commingled with gas produced onshore in Louisiana. The gas continues moving northeasterly through United's Montpelier Compressor Station to the Mississippi state line for ultimate sale for resale to customers outside the geographical limits of Louisiana. However, before the gas crosses the Louisiana-Mississippi boundary line, portions are sold for resale in the Florida Parishes area.

The Staff contends that either all, or an appreciable portion, of the above-mentioned offshore fields lie beyond the boundaries of the State of Louisiana in the Outer Continental Shelf area, which is subject to the jurisdiction and control of the United States and is administered by the Secretary of Interior in accordance with the terms and provisions of the Outer Continental Shelf Lands Act.[7] Staff further contends that gas produced in the Outer Continental Shelf area, beyond the Louisiana boundaries, and transported to the State of Louisiana and sold off United's Kosciusko line in the Florida Parishes area, constitutes gas which is transported and sold "in interstate commerce" within the meaning of that term as defined in Section 2(7) of the Natural Gas Act. Finally, Staff argues that since such out-of-state offshore gas constitutes an appreciable portion of the gas entering the Kosciusko line, where it is commingled

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with gas produced inside the Louisiana boundaries, the entire commingled stream in the Kosciusko line must be regarded as an *interstate stream—i.e.*, "in interstate commerce"; that accordingly, all gas sold in the Florida Parishes area off United's Kosciusko line should be regarded as jurisdictional.

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[7] 67 Stat. 462, 43 U.S.C. §§ 1331-1343.

The first question presented is whether the mentioned offshore fields are in fact *beyond* the boundaries of the State of Louisiana—a matter which is controlled by the Submerged Lands Act enacted by Congress in May 1953 (67 Stat. 29, 43 U.S.C. §§ 1301-1315). By that Act the United States relinquished to the coastal States all of its rights in the submerged lands within certain geographical limits, and confirmed its own rights therein beyond those limits. To effectuate these purposes, the Act

a) relinquished to the States the entire interest of the United States in all lands beneath navigable waters *within state boundaries;*
b) defined that area in terms of state boundaries "as they existed at the time a State became a member of the Union, or as heretofore approved by the Congress", not extending, however, seaward from the coast of any State more than three marine leagues in the Gulf of Mexico;
c) confirmed to each State a seaward boundary of three geographical miles, in any event;
d) retained in the United States all rights in submerged lands lying beyond those areas to the seaward limits of the Continental Shelf.

Subsequently, a litigated question arose between the coastal states and the United States as to the proper definition of the state boundaries as provided in the Submerged Lands Act. In *United States* v. *Louisiana,* 363 U.S. 1, 79 (1960), the Supreme Court found that Louisiana was entitled to submerged-land rights "to a distance no greater than three geographical miles from its coastlines, wherever those lines may ultimately be shown to be". The subsidiary controversy as to the proper location of the Louisiana coastline was left by the court to be resolved in some later proceeding. In its Final Decree entered on December 12, 1960, pursuant to this decision, the court decreed that

> "As against the respective defendant States, the United states is entitled to all the lands, minerals and other natural resources underlying the Gulf of Mexico more than three geographic miles seaward from the coastlines

of Louisiana, Mississippi, and Alabama . . . and extending seaward to the edge of the Continental Shelf. None of the States of Louisiana, Texas, Mississippi, Alabama or Florida is entitled to any interest in such lands, minerals or resources, and each of said States . . . are hereby enjoined from interfering with the rights of the United States in such lands, minerals and resources." (364 U.S. 502-3)

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The disputed question as to the proper location of the Louisiana coastline is presently being negotiated by a Joint Committee from the State of Louisiana and the United States Department of the Interior. (1:158) Under these circumstances, the Louisiana interveners contend that the factual question as to the proper location of the Louisiana coastline, and accordingly the controversy as to whether these particular offshore fields are within the boundaries of the State of Louisiana, may be resolved only by the Supreme Court and not by this Commission.

However, the matter need not be left in such an inconclusive posture for the purpose of the resolution of the jurisdictional issue in the instant proceeding. Offshore Blocks 32, 45 and 110 are shown on Exhibit 11, an enlarged map showing United's facilities. They are also located on the map attached as Exhibit A to Exhibit No. 12 in this proceeding. The mileage figures on Exhibit No. 11 indicate that there are 14.9 miles of pipeline from Block 32 to the Louisiana shoreline,[8] 10.4 miles of pipeline between Blocks 32 and 45, and 12.8 miles of pipeline between Block 45 and Block 110. It therefore appears that the United pipeline extends approximately 38 miles from the Louisiana shoreline before it reaches Block 110. (1:90)

As already noted, the Supreme Court in *United States* v. *Louisiana, supra,* stated that it did not intend in that particular decision "to settle the location of the coastline of Louisiana or that of any other State". (363 U.S. at 67,

[8] As there used, the term "shoreline" refers to "the line along which the marsh lands end and beyond which there is open water". (1:90)

footnote 108) In its Final Decree (364 U.S. 502) the Supreme Court decreed that the United States was entitled to all lands, minerals and other natural resources underlying the Gulf of Mexico "more than three geographic miles seaward from the coast lines of Louisiana, Mississippi and Alabama. . .", and further stated:

> "As used in this decree, the term 'coast line' means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters". (at 503)

The Staff notes that although the exact perimeters of the Louisiana coastline under the above-mentioned Supreme Court definition are still

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in dispute, it is clear that if the coastline were determined *on that basis* all of Block 110, all of Block 45 and all or most of Block 32 would fall outside the Louisiana boundaries. However, the situation is somewhat further confused as a result of the fact that the State of Louisiana in the above Supreme Court litigation contended, *inter alia,* that its coastline should be measured as defined in certain regulations promulgated by the Commandant of the Coast Guard pursuant to the Federal Act of February 19, 1895, 33 U.S.C. §§ 151. The Supreme Court deferred resolution of this question, stating:

> "We think the consideration of this contention should be postponed to a later stage of this case. We decide now only that Louisiana is entitled to submerged-land rights to a distance no greater than three geographical miles from its coastlines, wherever those lines may ultimately be shown to be". (363 U.S. at 79)

The Staff notes that even under the conditions most favorable to Louisiana—*i.e.,* use of the coastline as defined in the above-mentioned Coast Guard regulations—a line three geographical miles from the Louisiana coastline as thus determined would fall on the shoreward side of Block

110; that accordingly the producing area in Block 110 inevitably would be found *outside* the boundaries of Louisiana *under any theory which could be applied.* (Staff brief, pp. 17-18). It is of interest to note that the State of Louisiana, which is of course directly involved in the pending negotiations to determine the location of its coastline, did not in its instant reply brief comment upon or raise any question whatsoever with respect to this particular Staff conclusion—nor was this Staff conclusion questioned in any way in the reply briefs filed by any of the other Louisiana interveners.

It is therefore concluded that it can properly be assumed, for the purpose of the instant decision, that an appreciable portion of the gas entering United's Kosciusko line is out-of-state gas, produced *outside* the boundaries of the State of Louisiana. Under these circumstances, it is concluded that the entire commingled stream in the Kosciusko line must be regarded as an interstate stream, involving the transportation and sale of natural gas "in interstate commerce". The controlling physical fact is that there is no way to segregating the interstate and the intrastate molecules in that commingled stream in such a way that the gas delivered off the Kosciusko line to the Florida Parishes area will consist only of the gas which was produced *inside* the boundaries of Louisiana.

Under similar circumstances, the Commission held in the *Lo-Vaca* case, Op. No. 348, *supra,* that: . . . . . .

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"Sales of gas by interstate pipeline systems are sales in interstate commerce where the gas sold has been produced in another state *even when mixed with gas produced in the same state.*

* * * * * * *

"The same conclusion applies to sales of electric energy generated in another state *although mixed with energy generated in the state of sale.*" (p. 6; emphasis supplied)

In *Wisconsin-Michigan Power Co.* v. *F.P.C.* 197 F. 2d 472 (CA7, 1952),[9] the court stated:

> "Petitioners suggest that out-of-state energy sheds its interstate commerce garb when, after arrival in Wisconsin, it is continued in transmission, reduced from 132,000 volts to 33,000 volts and commingled with relatively larger quantities of Wisconsin generated energy." (at p. 447)
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> "As we understand petitioners' contentions, they insist that commingling, in Wisconsin, of Michigan generated energy with that generated in Wisconsin destroys the interstate character of the resulting mixture, so that all energy, after commingling takes place, is intrastate in character, having become part of the mass of goods within the state. But the reasoning of the courts quite generally is convincing that, even though the interstate component amounts to only a small percentage of the entire volume, the essential interstate character remains and sole jurisdiction is vested in the Commission.
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> "The fact that the amount of out-of-state energy is small in proportion to the total amount of energy sold is unimportant.
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> Nor does the fact that Wisconsin generated energy is commingled with energy transmitted from Michigan convert the transaction to local or intrastate activity." (at p. 478)[10]

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[9] Certiorari denied April 13, 1953, 345 U.S. 934.

[10] This decision was cited with approval by the Court of Appeals for the District of Columbia in *State of Wisconsin* v. *F.P.C.*, 201 F. 2d 183 (1952). Also see *Pennsylvania Water and Power Co.* v. *F.P.C.*, 343 U.S. 414, 419-20 (1952).

The Louisiana interveners, however, contend that, entirely apart from the considerations referred to above, gas produced in and transported from the Outer Continental Shelf area beyond the Louisiana boundaries to the State of Louisiana does not constitute gas transported or sold "in interstate commerce" within the meaning of that term as defined in Section 2(7) of the Natural Gas Act.

The status of the Outer Continental Shelf area is as follows. In 1953, subsequent to enactment of the Submerged Lands Act, Congress adopted the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1343, providing in detail for Federal exploitation of the submerged lands of the Continental Shelf beyond those granted to the States by the Submerged Lands Act. The Outer Continental Shelf Lands Act contains the following provisions which are deemed pertinent to this discussion:

43 U.S.C. Section 1332(a)

> "(a) It is declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter."

43 U.S.C. Section 1333(a)(1)

> "(a)(1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: . . ."

In addition, Sec. 9 of the Submerged Lands Act. *supra,* provides:

> "Nothing in this Act shall be deemed to affect in anywise the rights of the United States to the natural re-

sources of that portion of the subsoil and seabed of the Continental Shelf

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lying seaward and outside of the area of lands beneath navigable waters, as defined in section 2 hereof, all of which natural resources appertain to the United States, and the jurisdiction and control of which by the United States is hereby confirmed." (43 U.S.C. §§ 1302)

In *United States* v. *Louisiana*, 363 U.S. 1, 10, *supra*, the Supreme Court cited the above provision as authority for its conclusion that the Act "retains in the United States all rights in submerged lands lying beyond those areas to the seaward limits of the Continental Shelf . . ." And in its Final Decree issued in that case (364 U. S. 502) the Court decreed that:

> "As against the respective defendant States, the United States is entitled to all the lands, minerals and other natural resources underlying the Gulf of Mexico more than three geographic miles seaward from the coast lines of Louisiana . . . and extending seaward to the edge of the Continental Shelf."

It is thus clear that the Outer Continental Shelf area is an area subject to the exclusive jurisdiction and control of the United States.

The term "interstate commerce" is defined as follows in Sec. 2(7) of the Natural Gas Act:

> "(7) 'Interstate commerce' means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States."

There can be no doubt that the phrase "commerce between any point in a State, and any point outside thereof", when read according to its normal and natural meaning, is broad enough to include commerce between points inside

the state of Louisiana and offshore fields beyond the boundaries of Louisiana in the Outer Continental Shelf area. When read according to its natural meaning the phrase "any point outside thereof" is broad enough to include not merely *another state*, but also would include the District of Columbia, various possessions of the United States constituting organized Territories thereof, or lands merely subject to the jurisdiction and control of the United States, such as areas under United States lease (*i.e.*, the Canal Zone), or a Federal domain area over which the United States has exclusive jurisdiction and control. It would seem obvious that before this natural meaning of the phrase may be abandoned or disregarded for an artificially narrow or more limited construction, some strong and compelling reason therefor should be shown.

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The Louisiana interveners contend that such an artificially narrow construction of the phrase "and any point outside thereof" is required in view of the later clause limiting jurisdiction "only insofar as such commerce takes place within the United States". It is their position that the latter phrase "within the United States" must be read as meaning within the *mainland* United States"; that under the terms of the Outer Continental Shelf Act the submerged lands merely "appertain" to the United States, but are not part of the United States; that accordingly by adding the clause at the end of this section Congress intended to make it clear that the phrase 'any point outside thereof' was not to be given its normal or natural meaning, but instead must be read in a much more limited sense. The difficulty with the approach of the Louisiana interveners is that if the phrase "and any point outside thereof' is construed in such a way as *not* to include areas under exclusive United States jurisdiction and control, the result is to leave that phrase with only two possible alternative meanings, neither one of which would make any sense.

One such alternative would be to interpret the phrase as meaning "and any point *in another state*". However,

if Congress had intended this result it could have accomplished its purpose quite directly, simply and unambiguously by merely defining interstate commerce as "commerce between any point in a State and any point in another state as herein defined." There does not appear to be any possible explanation as to what could have impelled Congress under such circumstances to use instead the much broader phrase "and any point outside thereof", if such a limited purpose were intended. The second alternative possibility presented by the position of the Louisiana interveners would be that the phrase "and any point outside thereof" might be interpreted as meaning "and any point in another state, or any point *in a foreign country*". However, in order to accept such a construction we would have to believe that Congress used a broader-than-necessary first phrase for the sole purpose of adding in *foreign commerce*, merely so that foreign commerce could then be expressly excluded from coverage by the last phrase "but only insofar as such commerce takes place within the United States". Obviously this would not make sense, and there is no justification for assuming that Congress was interested in engaging in any such meaningless exercise.

It is of interest to note that this latter alternative is ruled out in any event by the decision of the Court of Appeals for the District of Columbia in *Border Pipe Line Co.* v. *F.P.C.*, 171 F. 2d 149 (1948), holding that the Section 2(7) definition of "interstate commerce" in the Natural Gas Act does *not* include *foreign commerce*. It thus follows that if the phrase "and any point outside thereof"

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were to be construed in such a way as not to include areas under exclusive United States jurisdiction and control, that phrase could have only *one* possible alternative meaning—*i.e., another state*. As already pointed out above, if Congress had any such limited intention its use of the broad phrase "and any point outside thereof" would have been entirely meaningless and unnecessary.

It is well to heed here the guiding principles laid down

for statutory construction under such circumstances by the Court of Appeals in the *Border Pipe Line Company* case, *supra*, as follows:

> "Congress uses expressions of established meaning.
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> "... where relatively plain language and congressional conduct of accepted implication point one way and the contrary appears only through strained and complex assumptions and deductions, questions which the administrators may have as to the full intent and desirable scope of the congressional action ought to be addressed to the Congress.
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> • • • • • • •
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> "It is bad from the viewpoint of sound government for the courts to twist strange results out of otherwise understood expressions of the legislature.
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> • • • • • • •
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> "The wise and sound course for the courts is to give to the terms of a statute their plain meaning, so long as the resultant effect is sensible and not in conflict with a discernible purpose." (171 F. 2d at 152-3)

If the Section 2(7) definition of "interstate commerce" is therefore simply read according to its natural and sensible meaning, the first phrase "and any point outside thereof" is broad enough to include the District of Columbia, any organized Territory of the United States, or lands merely subject to the jurisdiction and control of the United States, such as areas under United States lease or Federal domain areas over which the United States has exclusive jurisdiction and control. Similarly, it seems clear that the last phrase "but only insofar as such commerce takes place within the United States" was intended merely to insure that no regulatory authority would be exercised

by this Commission over that particular portion of any interstate commerce which takes place in any *foreign country* and which is thus subject to the laws of such country—for example, the case of a pipeline connecting Alaska and the State of Washington, but passing through Canada. On the other hand, no reasonable explanation can be advanced as to why Congress should have desired to exclude from coverage interstate commerce *not* involving the laws of a *foreign country,* but involving areas subject to the exclusive jurisdiction and control of the United States. Accordingly, no justification can be found for adopting the narrow interpretation of the Louisiana interveners that the later phrase "but only insofar as such commerce takes place within the United States" is to be read as meaning "within the *mainland* United States." As already noted above, Congress has specifically provided in Section 4(a)(1) of the Outer Continental Shelf Act that

> "The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing and transporting resources therefrom, *to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: . . .*" (emphasis supplied)

It is concluded that under these circumstances commerce between the State of Louisiana and areas subject to the exclusive jurisdiction and control of the United States in the Outer Continental Shelf area must be regarded as taking place "within the United States", within the meaning of Section 2(7) of the Natural Gas Act.

Finally, it is concluded that there is no common sense reason why Congress should have intended or desired the narrow construction contended for by the Louisiana interveners, since the result would have been to leave a gap in

the regulatory scheme. It should be noted there that although the Commerce Clause of the Constitution (Art. I, Sec. 8, Clause 3) vests in Congress the power

> "To regulate commerce with foreign Nations, and *among the several States,* and with the Indian Tribes . . .",

Congress has always regarded the Commerce Clause as empowering it to regulate not only commerce between different states, but also commerce between a state and any organized Territory of the United States, or between a state and the District of Columbia.[11]

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In the few cases where the question has been explicitly raised it has been held by the courts that "commerce between the States and a Territory which has become a part of the United States is interstate commerce". *Anderson* v. *Mullaney,* 191 F. 2d 123, 127 (CA9, 1951); *Inter-Island Steam Nav. Co.* v. *Territory of Hawaii,* 96 F. 2d 412, 416-7 (CA9). The Supreme Court acted on this assumption in *McLean & Co.* v. *Denver & Rio Grande R.R. Co.,* 203 U.S. 38, 49; *Hanley* v. *Kansas City Southern Ry. Co.,* 187 U.S. 617, 620; *Inter-Island Steam Nav. Co.* v. *Territory of Hawaii,* 305 U.S. 306, 313.

If the term "commerce . . . among the several States" in the Commerce Clause is broad enough to include commerce between a state and a Territory, or between a state and the District of Columbia, it would seem to be equally applicable to commerce between a state and an area subject to the exclusive jurisdiction and control of the United States, although not within a well-defined political unit. It follows, therefore, that prior to the enactment of the Natural Gas Act the states were without power to regulate

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[11] See Bituminous Coal Act, 50 Stat. 90, 26 U.S.C.A. § 3526(d); Securities Act of 1933, 48 Stat. 74, 15 U.S.C.A. § 77(b)(7); Interstate Commerce Act, 41 Stat. 474, 49 U.S.C.A. § 1(1)(c).

commerce in natural gas between a state and a Territory, or the District of Columbia, or any area subject to the exclusive jurisdiction and control of the United States. See, in this connection, the holding of the Supreme Court in *Standard Oil Company* v. *California,* 291 U.S. 242, 245 (1934) that a state

> "cannot legislate effectively concerning matters beyond her jurisdiction and within territories subject only to control by the United States".

Also see *Yellowstone Park Transportation Co.* v. *Gallatin County,* 31 F. 2d 644, 645 (1929) where the court held that a state had no jurisdiction over a Federal reservation, as follows:

> "In other words, after the date of cession, the territory was as much without the jurisdiction of the state making the cession as was any other foreign territory, except insofar as jurisdiction was expressly reserved".

There does not appear to be any possible reason why Congress should have desired or intended not to fill such a regulatory gap when it adopted the Natural Gas Act. The filling of such a gap by the imposition of Federal jurisdiction and control would not have involved any problem relating to operations which might be subject to the laws of a foreign country, and accordingly it was not subject to the considerations which led Congress to exclude *foreign commerce* from the coverage of the term "interstate commerce" in the Natural Gas Act.

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Since it thus appears that the clear and unambiguous language of Section 2(7) of the Natural Gas Act, as naturally read, is broad enough to cover commerce between any point in a state and the Outer Continental Shelf areas subject exclusively to United States jurisdiction and control, and since there is nothing in the legislative history of the Natural Gas Act indicating any intent or purpose not to cover such situations, the conclusion is inescapable that the

transportation and sale of gas from the Outer Continental Shelf area beyond the boundaries of Louisiana to the Florida Parishes area of Louisiana involves the transportation and sale of natural gas "in interstate commerce".

Before concluding, brief reference may be made to the argument advanced by intervener Louisiana Gas Service Company that Congress in enacting the Outer Continental Shelf Act evinced a clear intent not to extend the power of this Commission into that area. The contention seems to be that even if it were concluded that the definition of "interstate commerce" in the Natural Gas Act is broad enough to include commerce between a point in a state and an area subject to the exclusive jurisdiction and control of the United States, nevertheless when Congress enacted the Outer Continental Shelf Act in 1953 it expressed a clear and effective congressional intent that commerce between a state and the Outer Continental Shelf area should be excluded from the coverage of the Natural Gas Act and from the jurisdiction of the Federal Power Commission. It is concluded, however, that there is nothing in the Outer Continental Shelf Act itself, or even in the quoted interchanges with Senator Daniel of Texas which occurred during the congressional hearings on that Act, indicating any congressional intent whatsoever to deal *in that Act* with the question whether gas produced in the Outer Continental Shelf area should be regarded as subject to Federal Power Commission jurisdiction under the Natural Gas Act as gas "in interstate commerce".

For the reasons set forth at length above, it is concluded that the sales for resale made by United in the Florida Parishes area off its Kosciusko line must be regarded as jurisdictional.

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DECLARATORY ORDER

Upon consideration of the entire record in this proceeding, the evidence adduced and the briefs filed, the Presiding Examiner concludes, subject to review by the Commission on appeal, or upon its own motion as provided in the Commission's Rules of Practice and Procedure, that:

(A) The transportation and sale for resale of natural gas by United Gas Pipe Line Company *off its Lirette-Mobile line* within that part of its Jackson District located within the so-called Florida Parishes of the State of Louisiana is not subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act.

(B) The transportation and sale for resale of natural gas by United Gas Pipe Line Company *off its Kosciusko line* within that part of its Jackson District located within the so-called Florida Parishes of the State of Louisiana is subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act.

Joseph Zwerdling,
Presiding Examiner.

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

DOCKET No. CP62-161

UNITED GAS PIPE LINE COMPANY

OPINION No. 401

APPEARANCES

For United Gas Pipe Line Company: Vernon W. Woods, C. Hoffman Lewis, W. O. Crain.

For Willmut Gas and Oil Company: Thomas M. Knebel, Watkins & Rea.

For Texas Gas Transmission Corporation: George J. Meiburger, Christopher T. Boland, Robert O. Cook, William Feldhaus, Daniel O'Connell.

For Louisiana Attorney General and Louisiana Public Service Commission: Joseph H. Kavanaugh, Jack Gremillion.

For Louisiana Gas Service Company: Walter J. Suthon, III, Andrew P. Carter.

For Hammond Baton Rouge Brick Company, et al.: Tom H. Matheny.

For the Staff of the Federal Power Commission: Harwood G. Martin.

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Joseph C. Swidler, Chairman; Howard Morgan, L. J. O'Connor, Jr., Charles R. Ross, and Harold C. Woodward.

DOCKET No. CP62-161

UNITED GAS PIPE LINE COMPANY

OPINION No. 401

OPINION AND ORDER REVERSING IN PART AND ADOPTING IN PART INITIAL DECISION OF PRESIDING EXAMINER DETERMINING JURISDICTIONAL ISSUES

(Issued August 26, 1963)

Ross, Commissioner:

The question presented by this case is whether this Commission has jurisdiction over certain sales of natural gas for resale made by United Gas Pipe Line Company (United) to 21 Louisiana communities in United's Jackson District, which encompasses northern Louisiana and Mississippi. The Communities involved are located in that part of Louisiana lying north of Lake Pontchartrain and east of the Mississippi River known as the Florida Parishes area.[1]

This Commission has exercised jurisdiction over sales to the communities at issue since inception of federal regulation of United under the Natural Gas Act. The problem arises by virtue of an order issued June 8, 1961, by the

[1] The communities are Abita Springs, Amite, Bogalusa, Covington, Doyle, Franklinton, Greensburg, Hammond, Independence, Kentwood, Livingston, Madisonville, Mandeville, Montpelier, Natalbany, Pearl River, Pontchatoula, Port Vincent, Roseland, Slidell, and Walker.

Louisiana Public Service Commission which directed United to publish and apply intrastate rates prescribed by the Louisiana PSC to the sales at issue. These rates substantially differ from those

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presently in effect and United was granted a court order staying the effectiveness of the Louisiana PSC order. United also filed a Petition for Declaratory Order under Section 16 of the Natural Gas Act requesting the Commission to determine whether or not it has jurisdiction over the sales to the aforementioned 21 communities. In the petition, United takes no position on the issue but indicates that it is faced with conflicting orders of two regulatory Commissions, which forecast the possible imposition of severe penalties because of its obvious inability to comply with both orders.

Pursuant to our order of April 13, 1962, a hearing on United's petition was held. The uncontroverted evidence reveals that United is engaged in the transportation and sale for resale of natural gas in interstate commerce. By means of a fully integrated pipeline system, it transports and sells natural gas from fields in Texas, Louisiana and Mississippi to industrial and distributor purchasers in the foregoing states and in Alabama and Florida, and to other pipelines in Louisiana and Texas. We officially note that United also operates intrastate pipeline facilities which are completely separate from its interstate system and which are not under our jurisdiction.

Most of the Louisiana communities here involved are located on a line extending southward from Mississippi to a point northward of Lake Pontchartrain where it curves westward and later northward, forming a loop connected at both ends to United's 30", interstate Kosciusko line. United's line from Lirette in southern Louisiana to Mobile, Alabama is connected to the bottom of the loop by means of a short lateral. United's more recently constructed Kosciusko line extends northeasterly from the offshore producing areas south of Louisiana and forms part of the loop. See appended map.

Prior to 1951, United's Florida Parishes customers were served with gas, a portion of which was produced in Mississippi. Since the loss of a large sale in the Bogalusa area, most—but not all—of the gas to the communities located on the eastern part of the loop originates in Southern Louisiana. The evidence shows that the six communities having short laterals to the Kosciusko line (Port Vincent, Livingston, Doyle, Greensburg, Kentwood and Roseland) are served with gas, part of which is produced in off-shore fields. In addition, gas from this line serves some of the

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communities located on the southern and western part of the loop extending possibly as far east as Slidell. Thus the communities of Amite, Independence, Natalbany, Hammond, Pontchatoula, Madisonville, Mandeville, Abita Springs, Covington and Slidell can receive, and, to some extent do receive service from the Kosciusko line.[2]

As stated above, the customers on the eastern part of the loop receive gas which is produced principally in on-shore southern Louisiana. But they have also received, at times, gas which flowed back across the Mississippi line. Here again it was not possible to determine with accuracy the extent of the backflow in view of the automated nature of United's interstate system. The record also shows that these customers possibly still receive Mississippi produced gas from the north-south line extending to Louisiana and Mississippi and gas flowing westerly from Mississippi in United's Lirette-Mobile line.

Following the submission of briefs, the Examiner issued his initial decision in which he divided his consideration of the issue into two parts. He held that sales made from United's Lirette-Mobile line are not subject to this Com-

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[2] It was impossible for United's Chief Engineer to estimate the extent of the flow from Kosciusko towards Slidell because United's system is automated and gas automatically flows through its interstate lines depending on the pressures in the various lines.

mission's jurisdiction and that sales made from its Kosciusko line are subject to our jurisdiction.

With respect to the former conclusion, the Examiner reasoned that United's Lirette-Mobile sales represent gas which is produced, transported and sold within a state and not in interstate commerce as defined in Section 2 (7) of the Natural Gas Act. He further relied on the Shreveport case (*Houston, E. & W.T.R. Co.* v. *U.S.*, 234 U.S. 342, (1914) and *North Carolina* v. *U.S.*, 325 U.S. 507 (1945). The Examiner rejected the argument that these sales are interstate in character because some of the

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Louisiana produced gas sold within the state is associated in an interstate pipeline with gas destined for use beyond the State. Finally, the Examiner concluded that Congress did not intend to give this Commisison the fullest power possible under the Commerce Clause of the Constitution, but intended only to "plug the gap" comprising the area which certain early Supreme Court decisions had held the states constitutionally powerless to regulate.[3] The Examiner therefore determined that the Act provides no basis for the exercise of jurisdiction by this Commission over sales which have an impact on interstate commerce.

With respect to sales made from the Kosciusko line, the Examiner considered these sales in interstate commerce because some of the gas in the line originated at a point outside the state, i.e., offshore fields.

The case is now before us on exceptions to the Examiner's decision. Louisiana Gas Service Company, the Louisiana Public Service Commission, and Hammond-Baton Rouse Brick Company generally agree with the reasoning

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[3] The familiar "Attleboro gap", see *P.S.C.* v. *Attleboro Steam and Electric Co.*, 273 U.S. 83 (1927), *Missouri* v. *Kansas Gas Co.*, 265 U.S. 298 (1924), cited conspicuously in the legislative history of the Act. And see *P.U.C.* v. *Landon*, 249 U.S. 236 (1919).

of the Examiner in his findings of lack of jurisdiction but disagree with his finding of jurisdiction regarding Kosciusko sales. The Commission's Staff and Willmut Gas and Oil Company contend that the Commission has jurisdiction over all the sales in question.

For the reasons discussed hereinafter, we conclude that the Commission has jurisdiction over all the sales to the communities here in issue. In our opinion, the Examiner fundamentally erred in segregating the issue into sales characterized as being made from the Lirette-Mobile line or the Kosciusko line. As the evidence shows, such a dichotomy is illusory and fails to give due recognition to the fully integrated nature of United's interstate pipeline operation.

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At the outset, we point out that we have previously held in United Gas Pipe Line Company, Docket No. G-1142, *et al.*, 13 FPC 398, 405, (1954) that "the sales and service rendered in United's . . . Jackson districts are subject to the jurisdiction of this Commission." We have not deviated from this holding. The rate issues involved in that case were, however, substantially disposed of within the framework of the settlement process so that the question of jurisdiction was not discussed in detail. Therefore, we deem it appropriate in this proceeding to set forth fully the reasons for holding the disputed sales to be jurisdictional.

Section 1(b) of the Act provides:

> The provisions of this act shall *apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale* for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution or to the facilities used for such distribution or to the production or gathering of natural gas. (emphasis added)

Since these sales are admittedly for resale, the only issue before us is whether the gas sold is "in interstate commerce," as that term is defined in Section 2(7) of the Act.[4] However, that section provides no clear or adequate test for determining whether the *present* sales are in interstate or intrastate commerce.

Various tests are proposed by the examiner and the parties for determining the intra or interstate character of the onshore gas involved in the disputed sales. The examiner found the gas to be intrastate in nature because it was produced, transported and sold all within the confines of Louisiana. That the gas never left the state was, to the examiner, conclusive. Willmut argues that the fact of the indistinguishable mixing of all the gas in a single stream going outside of the state is determinative. Finally, Staff applies an "interdependence-substantial impact" test, emphasizing the interdependence of the disputed sales with, and their impact on, United's *integrated,* interstate operation.

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In reaching the conclusion that the gas here in question is "in interstate commerce," we feel that narrow "tests" should be avoided and instead, that the entire spectrum of pertinent factors should be examined.[5]

The most important consideration leading to the conclusion that these sales are in interstate commerce is that

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[4] Section 2(7) of the Act provides:

> "Interstate Commerce" means commerce between any point in a State and any point outside thereof or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

[5] In *Atlantic Coast Line Railroad Co.* v. *Standard Oil Co.,* 275 U.S. 257 (1927), the Court said, per Taft, J., (268-269), that "The question whether commerce is interstate or intrastate must be determined by the essential character of the commerce . . . "and" . . . the determination of the character of the commerce is a *matter of weighing* the whole group of facts in respect to it." (emphasis added)

the gas sold is part of a single, uniform stream flowing through United's interstate pipeline from the point of purchase in Louisiana, whether onshore or offshore, to United's customers in other states. Thus, the entire gas stream is, in the most literal sense, "in interstate commerce". The removal of a portion of the gas thus flowing in interstate commerce does not change the gas removed from the stream into intrastate gas. This conclusion is buttressed by the fact that the transactions between United and the producers who sold the gas in question are clearly within our jurisdiction. Underlying the decisions which establish our jurisdiction over such sales is the assumption that once gas has been sold by a producer to an interstate pipeline "it had commenced its journey in interstate commerce", even though some of that gas was sold in the states in which it was produced. *Deep South Oil Co.* v. *F.P.C.*, 247 F.2d 882, 888 (CA 5, 1957). Thus, in *Deep South Oil Co.* v. *F.P.C., supra,* the court held that Deep South's sales to an interstate pipeline were sales for resale in interstate commerce. The court noted that the pipeline might resell some of the gas within the state in which it was purchased. 247 F.2d at 887-88. So, too, in *Phillips Petroleum Corp.* v. *Wisconsin,* 347 U.S. 672 (1954), the Supreme Court held that Phillips' sales to interstate pipelines were sales for resale in interstate commerce. The Court wrote (347 U.S. at 692):

> . . . [T]he legislative history [of the Natural Gas Act] indicates a Congressional intent to give the Commission jurisdiction over the rates of all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring *before, during, or after transmission by an interstate pipe line company.*" (emphasis added)

The Court was apparently untroubled by the fact that some of the purchasing pipelines resold the gas bought from Phillips within the state in which it was purchased. Finally, we held in *Lo-vaca Gathering Co.*, Docket No. CI60-693, 26 FPC 606, (1961), petition for review filed February 8, 1962, No. 19478, (CA5), that sales by producers to an

interstate pipeline under contracts which expressly provided that the gas would be sold intrastate were sales for resale in interstate commerce, since they entered the stream of interstate commerce at the point of sale.

[835]

It follows that the Gas United sells here is "in interstate commerce".

Secondly, as we have pointed out above, at times some of these communities have received gas from points outside the state of Louisiana. Thus gas from offshore Louisiana moves through the Kosciusko line, serving customers along that line. In addition, gas flows from that line into the lateral which serves the remaining Florida Parishes communities. That lateral is also connected to the Lirette-Mobile line. Thus, as United states in its exceptions:

> Increasing volumes of gas automatically flow from the Kosciusko line into lines in the Florida Parishes as the pressure values in those Florida Parishes lines decline. This circumstance will cause some towns normally receiving gas transported through the Lirette-Mobile line occasionally to receive gas transported through the Kosciusko line. In addition, the distance gas from the Kosciusko line flows into the Florida Parishes lines will vary from time to time, as the automatic result of changes in demand and operating conditions, so that the number of Florida Parishes towns receiving some Kosciusko line gas does not remain constant.

This statement is supported by the record. (Tr. 134-136)

The Examiner recognized that communities served with gas from the Kosciusko line received gas that had moved in interstate commerce, but he apparently did not realize how many communities received such gas from time to time.

In addition, some gas has flowed back from Mississippi and reached towns along the eastern portion of the loop for

brief periods during 1958, 1959, and 1960.[6] The location of United's check meters makes it impossible to say how far the backflow reached, Tr. 148-49, but it may well have gone beyond Bogalusa. Tr. 87-88. Conceivably, the gas could have flowed back to any or all of the communities lying east of United's 6-inch lateral extending from the Kosciusko line to Amite, thus including most or all of the Florida Parishes area.

[836]

Since the frequency and extent to which Florida Parishes customers receive gas from outside the state depend upon pressure changes along United's line, it seems clear that these sales are within the stream of interstate commerce. *Cf. Kentucky Natural Gas Corp.* v. *Public Service Commission,* 28 F. Supp. 509, 511 (1939). These changes in the direction of the flow of gas, moreover, illustrate the extent to which the sales in question are an integral part of United's interstate operations.

Though the amount of gas involved in these occurrences was small,[7] they serve to point out the possible hotchpot which could occur by allowing two different and completely independent authorities to regulate sales of gas coming from the same pipeline. Because United's system is fully integrated, there is nothing to prevent gas flowing from different sources each day to the towns involved. This

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[6] Tr. 87-88, 125, 126-27, 129-30, 132-33.

[7] In *Conecticut Light & Power Co.* v. *Federal Power Commission,* 324 U.S. 515, 535-536 (1945) "only about one-fifth of one per cent of all the energy received and generated by the Company throughout the State of Connecticut was transmitted out of the state." The Court disposed of the company's contention that this volume was insignificant as follows: "We do not find that Congress has conditioned the jurisdiction of the Commission upon any particular volume or proportion of interstate energy involved, and we do not think it would be appropriate to supply such a jurisdictional limitation by construction." See also *Wisconsin-Michigan Power Co.* v. *F.P.C.,* 197 F. 2d 472, 478 (1952), *cert.* denied, 345 U.S. 934 (1953).

result would necessarily require the changing of jurisdiction at the same time. The consumers and the pipe line company should not be subjected to such contingencies which can be caused, as was the fact in one instance, by the mere loss of one customer.[8]

Our conclusion that these sales are in interstate commerce reflects the substantial impact sales as those in dispute here can have on United's interstate operations. The gas used in making such sales is purchased by United, under producer rate schedules subject to FPC jurisdiction, for its overall system supply without distinguishing between the Louisiana markets and the out-of-state markets. There is also an inter-relation between the rates for these sales in Louisiana and United's sales outside the state, for if Louisiana sets rates that are too low, and United's return is consequently reduced, its capital costs may rise.[9] Increased capital costs would normally be reflectel in higher interstate rates.

[837]

In concluding as we have that the sales in question are in interstate commerce we are mindful of the implications of a contrary holding for our certificate jurisdiction—which also extends to sales and transportation "in interstate commerce". If we lack rate jurisdiction over these sales, we would also apparently lack power to require that they be certificated. Absent such authority, we might be powerless to prevent United from selling gas in the producing state even though, as here, that gas has been dedicated to the interstate market by a certificate of public convenience and necessity and even though we relied upon the availability of that gas in authorizing sales for resale to customers in other states. In this case, Louisiana has set rates below the level we think just and reasonable.[10]

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[8] Tr. 133.

[9] The rate set by the Louisiana Commission for the gas involved in the disputed sales is almost 9¢ per Mcf lower than that set by this Commission. This will result in a revenue loss to United of about $304,000 annually.

[10] See footnote 9, *supra.*

Consequently, there is no incentive to United to divert interstate gas to the Louisiana market. But it is certainly conceivable that in the future Louisana might feel impelled to direct United to increase deliveries to these communities even though United would then be required to deliver gas already dedicated to the interstate market. In the light of these considerations, and because we think the gas United sells is clearly in the stream of interstate commerce, we conclude that the sales in question are subject to our jurisdiction.

Our view is supported by two court decisions almost directly in point. One, *Kentucky Natural Gas Corporation* v. *Public Service Commission,* 28 F. Supp. 509 (D. Ky. 1939) aff'd. per curiam, 119 F 2d 417 (CA 6), was handed down shortly after the Natural Gas Act was passed. In that case the gas company argued that its sales for resale in Kentucky were not subject to state regulation, even though it sold gas produced in Kentucky. Instead, it argued, the sales were subject to the exclusive jurisdiction of this Commission because the company was an *interstate* pipeline. The state argued:

> "(1) that in transporting gas from fields in Kentucky to purchasers within the state, the complainant is engaged in intrastate commerce;
>
> (2) that such transactions are and should be treated as separate and distinct, notwithstanding their relation to interstate business, and as such are subject to regulation and control by the Kentucy Commission . . ." 28 F. Supp. 512.

The Court rejected these contentions, noting that the Company's fully integrated character and predominant interstate features required federal regulation.[11] We completely agree with the Court's conclusion

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[11] "In structure and operation, such continuity exists throughout the system that regulation at one point or control of a single activity would necessarily affect the whole structure. The sale and delivery of gas at wholesale from the interstate pipe line to local distributing companies is

set forth at page 513: "The established course of business being predominantly interstate, the mere fact that some gas from the interstate stream is sold and delivered in the state of its origin affords that state no superior power to regulate or control the transaction." [12]

Kentucky Natural Gas Corp. was followed by the Kentucky Supreme Court on similar facts in *Columbian Fuel Corp.* v. *Public Service Commission,* 333 S.W. 2d 945 (Ky. Sup. Ct., 1959).

We do not accept the view that because the gas did not leave the State, it cannot be "in interstate commerce". In placing substantial reliance upon this factor, the examiner cited as his authority *Houston, E. & W.T.R. Co.* v. *United States,* (the *Shreveport Rate Case*) 234 U.S. 342 (1914) and *North Carolina* v. *United States,* 325 U.S. 507 (1945). In those cases passengers who embarked and disembarked from a train before that train had crossed a state boundary were said to have "an admittedly intrastate character". *Wickard* v. *Filburn,* 317 U.S. 111, 123, (1942). There is a sharp distinction between these cases and the present one. Those cases involved passengers who from the outset had interstate or intrastate identities. From the very moment a ticket was purchased, it could be determined whether the passenger was interstate or intrastate. But in the instant case there is only one uniform

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an integral part of the major enterprise, commerce between the states. Under such circumstances, regulation in the public interest is national rather than local, demanding a standard of uniformity unattainable except through a single paramount authority." 28 F. Supp. 512-13.

[12] In the present case, less than 3% of the gas flowing through United's interstate pipeline is sold in Louisiana. This figure is derived from an exhibit in a pending United rate case, Docket No. RP62-161. The exhibit shows United Sales in Florida Parishes for the twelve months ended November 30, 1959. The net flow into Florida Parishes was 282,759,136 Mcf while the line flow at the Louisiana-Mississippi State lines is 278,933,384 Mcf.

and indistinguishable flow of gas, a very small portion of which is siphoned off before leaving the state. Until the gas reaches the point of separation, there is no way of knowing which part of the gas will continue into other states.[13] The stream of gas once having acquired an interstate character, a part of it cannot be said to lose that character by virtue of being sold within Louisiana.

As noted earlier, whether or not the disputed sales are subject to this Commission's jurisdicition cannot be determined from the language of the Act alone. In addition, we feel that the legislative history of the Natural Gas Act is also inconclusive. We agree that Congress' primary purpose in enacting the Natural Gas Act was to "plug the regulatory

[839]

gap" created by a series of Supreme Court decisions prohibiting the states from regulating wholesale sales in interstate commerce while leaving them free to regulate retail sales to local consumers. Thus in House Report No. 709, 75th Cong., 1st Sess., April 28, 1937, the Committee on Interstate and Foreign Commerce stated at p. 2-3:

> "The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of Congressional prohibition, subject to state regulation. There is no intention in enacting the present legislation to disturb the States in their exercise of *such jurisdiction.* However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example, sales

[13] Therefore, a case where two different gases were contractually separated by the producer at the time of sale to the pipe line, so that the gas which was designated "intrastate" was at all times identifiable and determinable despite the physical commingling, even if correctly decided, is inapposite here. *State of North Dakota* v. *F.P.C.*, 247 F. 2d 173 (CA 8, 1957).

by producing companies to distributing companies) the legal situation is different. Such transactions have been considered to be not local in character and, even in the absence of Congressional action, not subject to State regulation. See *Missouri* v. *Kansas Gas Co.*, 265 U.S. 298 (1924) and *Public Service Commission* v. *Attleboro Steam and Electric Co.*, 273 U.S. 83 (1927). The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act." (emphasis added)

The state jurisdiction which the report says was not to be disturbed was jurisdiction over intrastate consumer sales and sales by interstate pipeline *directly* to consumers. But the report does not state whether the Committee considered gas sold for resale by interstate pipelines in the states in which it was purchased—intrastate or interstate—although federal regulation of such sales would clearly be within Congress' power.

In the absence of a direct statement of what Congress intended, we must attempt to determine what Congress would have said about this particular problem if it had been brought to its attention.[14]

[840]

We do not think it is sufficient to ask simply whether the states could constitutionally have regulated the sales at issue here.[15] Rather we are compelled to ask whether a

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[14] The "divination of legislative design" requires "an effort to penetrate imaginatively into an assumed mind of an assumed collectively called Congress in order to conceive what that assemblage would have thought about this particular detail had it thought in such particularity rather than in categories considerably more general". Powell, *Physics and Law-Commerce in Gas and Electricity*, 58 Harv. L. Rev., 1072, 1092 (1945).

[15] See *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U.S. 498, 504-06, 509 (1942); *Phillips Petroleum Corp.* v. *Wisconsin*, 347 U.S. 672 (1954); *North-*

statutory scheme which would include wholesale sales at one end of a pipeline [16] but would exclude the same sales, from a common stream, if made at the other end of a pipeline, would make sense. We think it would not. The impact of federal regulation over all of these sales on interstate and local consumers, as well as on the distribution of regulatory power between the states and the federal government, is identical. We conclude that had Congress considered the sales here in question, it would have treated them as "in interstate commerce". See *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co., supra.*

Other Matters

The matters raised and argued in the parties' briefs and exceptions are, we think, sufficiently disposed of by the foregoing discussion. United requested in its exceptions that, if we adopt the examiner's decision, we designate specifically which of the twenty-one disputed sales are jurisdictional because some of them are made on some occasions by gas from the Lirette-Mobile line and on other occasions by gas from the Kosciusko line. However, in view of our decision, the above facts no longer present any problem.

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ern Natural Gas Co. v. *State Corporation Commission of Kansas,* 372 U.S. 84 (1963). The Supreme Court has said:

> ". . . the Court, in determining the validity of state regulations, has been less concerned to find a point in time and space where the interstate commerce in gas ends and intrastate commerce begins, and has looked to the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in the commerce." *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co., supra,* at 505.

[16] See H.R. Rep. No. 709, *supra,* and cases cited therein.

The Commission orders:

(A) The Federal Power Commission has jurisdiction under the Natural Gas Act, and particularly Sections 2(7) and 1(b) thereof, over the transportation and sales for resale of natural gas by United Gas Pipe Line Company by means of and from its interstate facilities within that part of United's Jackson District located within the Florida Parishes area of the State of Louisiana.

(B) The presiding examiner's initial decision issued February 25, 1963, in this proceeding is reversed in part and affirmed in part as more fully set forth hereinabove. Except to the extent hereinabove granted, the exceptions to the said examiner's decision are denied.

By the Commission. Commissioner O'Connor, with whom Commissioner Woodward joins, concurring in part and dissenting in part filed a separate statement appended hereto.

(Seal)

JOSEPH H. GUTRIDE,
Secretary.

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DOCKET No. CP62-161

UNITED GAS PIPE LINE COMPANY

(Issued August 26, 1963)

Commissioner O'CONNOR, with whom Commissioner WOODWARD joins, concurring in part and dissenting in part:

I respectfully dissent from the majority's decision that all of United's sales for resale in the Florida Parishes of Louisiana to the 21 communities in issue are subject to Federal Power Commission jurisdiction. As to United's sales in issue from its Kosciusko line, I conclude that, although the question is not without doubt, those sales are jurisdictional. Accordingly, I would affirm the examiner's decision. The discussion which follows is confined principally to the sales by United from its Lirette-Mobile line.

I am convinced that, under the law and on the facts, United's Lirette-Mobile sales in issue are not interstate under Section 2(7) of the Natural Gas Act but are intrastate and, accordingly, are not subject to Commission regulation under Section 1(b) of the Act.[1] Since they are intrastate, these sales are subject to regulation by the State authorities, which indeed have regulated sales of this character for many years.

The majority's error is of grave importance, for it expands Commission jurisdiction to embrace a whole new, broad class of sales heretofore considered subject to State and not federal regulation. Thus, it will have a national impact with consequences far transcending the importance of this particular case, effecting a fundamental change in the distribution of authority between the federal and State governments in the regulation of the natural gas industry. I firmly believe that due and proper regard for law compels vigorous regulation of the matters committed by law

[1] Sections 2(7) and 1(b) of the Act are quoted *infra*, footnote 5.

to Commission jurisdiction. By the same token, due and proper regard for principles of law, for the legal process and for the distribution of lawmaking power between the branches of our government compels my opposition to the assertion of Commission power over matters which the law has not made subject to Commission jurisdiction.

[843]

I. Source of Gas for the Disputed Sales

It is clear from the record that United's sales in issue fall into two distinct categories which differ materially as to the facts. First, United makes sales to certain of the 21 Louisiana communities from its Lirette-Mobile line. The Lirette-Mobile line originates in an *onshore* production field in Louisiana. It transports gas from those fields and delivers it for the disputed sales, after which it proceeds outside the State to serve certain out-of-state markets not here in issue. Thus, the gas for these disputed sales is *produced solely* in Louisiana, is *transported solely* in Louisiana and is, of course, *sold solely* in Louisiana. En route to Louisiana markets, the gas for these sales is commingled in the Lirette-Mobile line with other gas destined for out-of-state markets; but none of the gas for the disputed sales *ever* leaves the State of Louisiana. These sales the examiner held are intrastate on their face; indeed, it is difficult to conceive of sales that are more clearly intrastate.

Second, United makes sales for resale to some communities in the Florida Parishes from its Kosciusko line. The gas for these sales is produced, in part, from fields some 15 to 38 miles off the Louisiana coast. En route to Louisiana markets, it also is transported in a large, high-pressure line which ultimately goes outside the State, the Kosciusko line, and is commingled with gas destined for out-of-state markets. These sales the examiner correctly held are interstate and jurisdictional because a significant portion of the gas involved is produced outside Louisiana.

The majority concludes that *all* the above sales are interstate and jurisdictional on the theory, among others, that United's system is "fully integrated." And seeking

to substantiate this theory, the majority rejects the examiner's analysis of the sales in issue in the above two categories involving different facts and separate questions. Instead, the majority implies that all the sales are materially alike factually, in that all do, or did, or possibly can at times receive service with offshore gas. However, it is clear from the record that the sales to the 21 Louisiana communities in issue include one group of sales involving onshore gas transported through the Lirette-Mobile line, and another group involving offshore gas transported through the Kosciusko line.

Considering the latter group first, the record shows that offshore gas transported through the Kosciusko line is delivered to Kentwood and Roseland (Tr. 97, 134), and also to Doyle, Livingston, Port Vincent and Walker (Tr. 109). In addition, substantial offshore gas is delivered to Amite and Independence, which also receive onshore gas from the Lirette-Mobile line (Tr. 92-93). Under the principles of law discussed and applied by the examiner, the record supports a holding that these sales are interstate and jurisdictional.

[844]

In contrast, the record shows that as a matter of regular operation, onshore gas transported through the Lirette-Mobile line is used to supply Abita Springs, Bogalousa, Covington, Franklinton, Hammond, Madisonville, Mandeville, Natalbany, Pearl River, Ponchatoula and Slidell. Although there was testimony that on peak days some offshore gas from the Kosciusko line flows south of Independence a distance *toward* some of the above towns in accordance with demands and operating conditions, it was stated that the quantities of such gas could not well be determined (Tr. 135). And there was no evidence establishing which of these towns, if any, receive such offshore gas, or the quantities, if any, they receive. Thus, the compelling inference from the record is that these eleven towns receive no significant quantities of offshore gas. And this, in substance, was the conclusion of the presiding examiner who heard the testimony.

A careful reading of the majority opinion (Mimeo pp. 7-8) will reveal the rather surprising basis upon which it finds that these eleven towns are sold interstate gas and that the sales therefore are jurisdictional. There is no finding that significant amounts of interstate gas are regularly delivered to the towns.[2] There is not even a finding that *any* amounts have *ever in fact* been delivered under present operating arrangements. Piecing together the critical findings, the strongest case assembled by the majority is that "for brief periods during 1958, 1959 and 1960" (meaning five occasions in a four-year test period), a "small amount of gas" (meaning 2 to 10 hours service on each occasion) "conceivably" "could have" flowed (meaning the evidence did not establish that this *de minimus* amount of gas *in fact* flowed or even *probably* flowed[3] to these eleven towns. Stated

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more directly, the majority grounds its jurisdiction on a *remote possibility* (the word "conceivably" was well chosen) that during the four-year period covered by the testimony, an infinitesimal amount of interstate gas *might have* gotten to these towns on five brief occasions. It hardly seems necessary to draw the conclusion that this theory in support of jurisdiction does not merit serious consideration.[4]

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[2] If such a finding could be made, I would agree that sales to these towns, like the sales discussed on page 2, *supra*, would be jurisdictional.

[3] The quotation from United's *brief* (Mimeo p. 7) is erroneously relied upon by the majority. It is not evidence upon which findings can be based, it was not subject to cross-examination and it is factually inconsistent with the carefully worded testimony in the record.

[4] The majority's quotation from *Connecticut Light & Power Co.* v. *F.P.C.*, 324 U.S. 515 (1945), like others used in its opinion, seems impressive only if taken out of context. Significantly (and consistently—see Part IV, *infra*), the majority does not explain the issues and holding of the

II. Statutory Provisions

Whether or not the Commission has jurisdiction over United's sales of Louisiana-produced gas delivered from the Lirette-Mobile line—the question in dispute here—is to be determined on the basis of Sections 1(b) and 2(7)

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case. The case presented a question arising under the Federal Power Act, not the Natural Gas Act. Moreover, it dealt with the jurisdictional basis for accounting regulation, not with jurisdiction over sales. At issue was the status of a primarily intrastate electric system which included facilities in a small town which *actually received* interstate electricity and received it exclusively for 24 hours per day and 365 days per year—not one that "conceivably" "could have" received it on five brief occasions in a four-year period. The Court held that if this town's facilities were not solely for "local distribution" (an issue it remanded to the Commission), then the company owned facilities for the transmission of electricity in interstate commerce and was therefore a jurisdictional company for accounting purposes, notwithstanding the fact that the rest of the system was intrastate in character.

Therefore, even if an analogy can be drawn between these two different jurisdictional issues (a highly questionable matter which need not be resolved here), the case relied upon by the majority *at most* supports only the proposition that jurisdiction attaches where a gas stream consists primarily of intrastate volumes but includes a small interstate portion which is *actually* and *regularly* present. On this much the Commission is unanimous, for this is the case in several of the towns discussed on page 2, *supra*. However, as the majority's own carefully worded findings clearly show, the evidence here does not establish that *any* interstate gas was in fact delivered or even probably delivered to the 11 towns listed above; and the evidence flatly contradicts the possibility that whatever deliveries "conceivably" "could have" occurred were regular. Thus, the majority's decision finds no real support in *Connecticut Light & Power*.

of the Natural Gas Act.[5] Section 1(b) gives the Commission jurisdiction over "the sale in interstate commerce of natural gas for resale," with "interstate commerce" defined by Section 2(7) as "commerce between any point in a State and any point outside thereof." Section 1(b) further *excludes* from coverage "any other . . . sale of natural gas," i.e., any intrastate sale.

These clear and unambiguous provisions standing alone are sufficient to establish that United's Lirette-Mobile sales are *not in* interstate commerce, and so are excluded from our jurisdiction by the last clause of Section 1(b). For as described above, the gas for these sales moves *solely within one State,* the State of Louisiana, being produced in Louisiana fields, transported solely within Louisiana and sold solely in the Florida Parishes area, still in Louisiana. Clearly, therefore, these sales do not involve "commerce between any point in a State and any point outside thereof" within the terms of Section 2(7), but only commerce between two points in the same State.

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[5] Section 1(b) of the Act provides:

> The provision of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution or to the facilities used for such distribution or to the production or gathering of natural gas.

Section 2(7) of the Act provides:

> "Interstate commerce" means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

The majority finds that our jurisdiction "cannot be determined from the language of the Act alone" (Mimeo p. 10). But Congress felt exactly the opposite. The reports from the House and Senate Committees both stated that the provision defining interstate commerce was "*self explanatory.*" H.R. Rep. 709, 75th Cong. 1st Sess., p. 4, S. Rep. 1162, 75th Cong., 1st Sess., p. 4. Obviously the only self-explanatory interpretation of "commerce between any point in a State and any point outside thereof" is one which is confined to exactly those events—and which patently excludes the disputed sales involving only commerce between two points in the same State.

[847].

Conspicuously absent from the majority opinion is *any* interpretation of the words with which Congress carefully defined interstate commerce, much less an explanation of how that interpretation could be "self-explanatory." Instead, the majority attempts to delete this inconvenient provision from the statute by stating that "narrow 'tests' should be avoided" (Mimeo p. 6).

Even United Gas—contrary to the majority's suggestion that it has taken no position on the issues before us—finds this question so clear as to be indisputable. "Certainly gas sold by United Gas Pipe Line Company which is produced, transported, sold and consumed all within one state does not come within the definition of interstate commerce contained in the Natural Gas Act." Original Brief of Petitioner, p. 33.

III. Intent of Congress

The legislative history of the Natural Gas Act emphatically confirms the conclusion that the Congress meant what it said in limiting this Commission's jurisdiction to gas flowing "between any point in a State and any point outside thereof."

The predominant theme of the legislative history is that Congress by this Act did not intend to give the Commission the fullest power possible under the Commerce Clause of the Constitution, but explicitly intended only to "plug

the gap'' left by certain Supreme Court decisions prior to 1938.[6] As stated in the Senate Interstate Commerce Committee report, ''the basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act. . . . The bill takes *no authority* from State commissions, and is so drawn as to complement and *in no manner usurp* State regulatory authority.'' S. Rep. 1162, 75th Cong., 1st Sess., p. 2. (Emphasis added.) The House Committee report, H.R. Rep. 709, 75th Cong., 1st Sess., p. 2, included identical language. This explicit purpose not to interfere in any way with constitutional State regulation is recognized by numerous decisions of the Supreme Court stating that the Act had ''no purpose or effect to cut down State power,'' but was to ''aid in making State regulation effective'' and was ''drawn with meticulous regard for the continued exercise of State power, not to handicap or dilute it in any way.''[7]

[848]

The gap referred to was a regulatory vacuum created by Supreme Court decisions holding that in certain circumstances the States were constitutionally powerless to regulate sales of gas. Each of these cases reversed an attempted regulation by a State of gas which came from beyond that State or which was destined beyond its borders. This and this only was the regulatory gap which Congress intended to fill and beyond which Congress explicitly stated our power was not to extend. These and these only were

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[6] H.R. Rep. 709, 75th Cong., 1st Sess., pp. 1-2, S. Rep. 1162, 75th Cong., 1st Sess., pp. 1-2. The relevant decisions are *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U.S. 23 (1920); *Missouri* v. *Kansas Natural Gas Co.*, 265 U.S. 298 (1924); *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927).

[7] See e.g., *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954), erroneously relied on by the majority; *Panhandle Eastern Pipe Line Co.* v. *PSC*, 332 U.S. 507 (1947); *F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944).

the cases discussed by Congress in considering this legislation.

The case before us plainly does not involve regulation of gas which originated outside of Louisiana or which is destined beyond that State's borders. Therefore, *prima facie*, the case does not fall within the class of cases to which Congress directed its attention and to which its legislation was specifically limited.

The majority argues, however, that while this gas is produced, transported and sold within one State, it is sold from an interstate pipeline to a distributor for resale and because of this characteristic is subject to our limited jurisdiction (Mimeo pp. 10, 11). This flies directly in the face of the decision in *Peoples Natural Gas Co.* v. *Public Serv. Comm.*, 270 U.S. 550 (1925). There West Virginia gas was fed into an interstate pipeline system which carried it across the border into Pennsylvania, where Pennsylvania-produced gas was added to the stream. The commingled West Virginia and Pennsylvania gas was then sold for resale to a distributor further down the line in Pennsylvania.[8] A unanimous Court, which included Justices Holmes, Brandeis and Stone, stated that the West Virginia-produced gas was of interstate character and could not be regulated by the Pennsylvania Commission. However, it held that the Pennsylvania-produced gas, which was fed into part of the interstate pipeline system and commingled with the interstate West Virginia gas, could be identified in quantity and could be regulated by Pennsylvania.

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[8] The West Virgina portion of the system was owned by a different corporation, unaffiliated with the Pennsylvania portion. However, the Court treated the fact of divided ownership as immaterial, stating that "the passing of custody and title [of the gas] at the state boundary without arresting the movement to the destinations intended are minor details which do not affect the central nature of the business." 270 U.S. at 554.

Thus, the very circumstance cited by the majority to distinguish the instant sales—that they are made from an interstate pipeline system for resale—was focused upon by the Supreme Court which held that this fact does not make an interstate transaction. This dissolves the theory relied upon by the majority that the transmission in part of an interstate pipeline system of intrastate gas converts it to interstate gas or somehow changes its nature.

Second, and equally important, this decision establishes in a clear and unambiguous holding that a State commission can regulate wholesale sales of gas produced, transported and delivered solely within that State notwithstanding its transmission in part of an interstate pipeline system. Therefore, wholesale sales of this nature do not fall within the regulatory gap which defines and delimits our jurisdiction. Rather, these wholesale sales are subject to State regulation and are precisely the type of sales which Congress explicitly excluded from this Commission's realm.

But the majority contends that its regulatory powers would be more logical and complete if the Commission had jurisdiction over all wholesale sales (Mimeo p. 12). However, unlike the majority of this Commission, the Congress which enacted the Natural Gas Act was not striving to create a complete and comprehensive plan of federal regulation which readily preempted State regulatory authority in an urge for a consistent "statutory scheme." Instead, Congress made crystal clear its purpose was to set up a commission with limited jurisdiction created only to fill the regulatory gap and not to displace any constitutional State regulation. This was manifest in the statutory provisions,[9] explicitly stated in both Committee reports [10] and reaffirmed in the clearest of language in the debates before both houses of Congress. In his intrductory remarks the House sponsor of the bill, Congressman Lea, stated

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[9] See Part II, *supra.*

[10] See p. 6, *supra.*

"The primary purpose of the pending bill is to provide Federal regulation, in those cases where the State commissions lack authority, under the interstate commerce law. *This bill takes nothing from the State commissions; they retain all the State power they have at the present time.*" 81 Cong. Rec. 6721 (1937). The Senate sponsor, Senator Wheeler, was equally clear: "[A]nd let me say to the Senator that, as a matter of fact, *the bill does not interfere with the State regulation, in any way, shape, or form.*" 81 Cong. Rec. 9312 (1937). (Emphasis added.) It is difficult to understand the majority's willingness to cast aside these repeated and unanimous expressions of intent to preserve constitutional State regulation in favor of its own concept of logical regulatory power which is nowhere mentioned in the Act or reports or debates, which contradicts the statutory definition of interstate commerce and which usurps State regulatory authority.

[850]

In conclusion, it is an instructive observation, although not a surprising one, that the intent of Congress as revealed by the legislative history independently supports and exactly explains the jurisdictional limitation contained in the statutory definition of interstate commerce. As stated by the Committee reports and the sponsors of the bill, Congress intended to fill a regulatory gap but not to displace any constitutional State regulation. The gap was created because the States were held powerless to regulate gas which flowed in more than one State. Thus, the Act was deliberately worded to apply only to gas flowing "between any point in a State and any point outside thereof," a standard which Congress considered self-explanatory. At the same time the Act explicitly excluded authority to regulate "any other . . . sale of natural gas."

The sales disputed here do not involve gas which flows between two States. They involve only gas produced, transported and sold solely within Louisiana. Its transmission in part of an interstate pipeline system does not make it "interstate," nor is Louisiana powerless to regulate it. I submit, therefore, that consideration of the legislative

history compels the conclusion that regulation of these sales is not within our jurisdiction.

IV. Judicial Decision Defining Interstate Commerce

The distinction between interstate and intrastate commerce based on actual movement between States has been recognized and maintained by the courts. The Supreme Court as long ago as 1914 noted that commerce in principle identical to that involved in this case is intrastate. In the familiar *Shreveport Rates Cases, Houston, E. & W.T.R. Co.* v. *U.S.*, 234 U.S. 342, the Court accepted as seemingly self-evident the principle that railroad traffic between two points in Texas was intrastate, although the trains and railroad lines which carried the intrastate traffic went to and served markets outside the State. And as recently as 1945 the Court, in *North Carolina* v. *U. S.*, 325 U.S. 507, accepted the same principle that rates concerning passengers traveling within the State of North Carolina on trains going outside the State were intrastate. These authorities clearly establish that United's disputed sales are intrastate and non-jurisdictional, as the examiner held.

The majority attempts to avoid the otherwise controlling effect of these decisions by observing that intrastate train passengers are more easily identifiable than intrastate gas molecules. This is true but irrelevant, for it ignores two determinative facts: that the critical event with which we are concerned is the sale by United to the local communities; and that at the time and place of sale, *each and every* cubic foot of gas delivered by United is both identifiable and identified as gas produced, transported and sold solely within Louisiana. Like the passengers in *Shrevcport,* all the gas involved in the disputed sales is unquestionably known to be exclusively intrastate.

[851]

Indeed the *Shreveport* principle has been applied specifically to natural gas in the *Peoples* case, *supra.* As noted in Part III, the unanimous Court there held that gas produced, transported and sold solely within Pennsylvania, yet carried in part of an interstate pipeline system and

commingled with interstate gas, maintained its intrastate character. With clarity that can be ignored but not distinguished, the Court stated:

> "As respects the Pennsylvania gas we think it must be held to be in intrastate commerce only. Feeding it into the same pipelines with the West Virginia gas works no change in this regard. Of course after the commingling the two are undistinguishable. But the proportions of both in the mixture are known and that of either readily may be withdrawn without affecting the transportation or sale of the rest. So for all practical purposes the two are separable, and neither affects the character of the business as to the other. 270 U.S. at 554-55.

Similarly, in *State of North Dakota* v. *F. P. C.*, 247 F. 2d 173 (8th Cir. 1957), it was held that gas produced, transported and sold within one State was intrastate notwithstanding its transmission in part of an interstate pipeline system commingled with interstate gas. There the narrow question was whether the sale of gas by a North Dakota producer to an interstate pipeline for resale in North Dakota was jurisdictional. The court framed the issue: "Does natural gas produced, wholesaled, transported and sold for immediate consumption solely within the State of North Dakota become a proper subject for federal regulation as being in interstate commerce, because part of its transportation occurs in a commingled state with gas admittedly being transported in interstate commerce?" It concluded: "The transactions in question cover gas produced, transported, sold and consumed entirely in the State of North Dakota. That does not constitute interstate commerce in any sense of the word." 247 F. 2d at 176-178.

In decided contrast to the facts of the above cases and those of the sales disputed here, *each and every* decicion cited by the majority involved a stream of gas which, at the time and place of regulation, included at least substantial amounts coming from or destined to go beyond the State, with no attempt to identify or separate the intrastate portion (if any). In *Phillips Petroleum Corp.* v. *Wis-*

consin, 347 U.S. 672, 675 (1954), the Court stated that, after processing, the gas was sold and delivered to an interstate pipeline company and "then continues its flow through the interstate pipeline system until *delivered in other states.*" The court in *Deep South Oil Co.* v. *F. P. C.*, 247 F. 2d 882, 887 (5th Cir. 1957), concluded: "We think it plain that they [the sales is issue] are sales 'in interstate commerce' for the obvious reason that the sale of gas originating in one State for its transmission and delivery to distributors *in any other State* constitutes interstate commerce." Similarly, the court found in

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Kentucky Natural Gas Corp. v. *Public Serv. Comm'n.*, 28 F. Supp. 509, 511-12 (D. Ky. 1939), that "in the first three months of 1939 from 47 to 53 percent of the gas sold in Kentucky was brought in from outside the State, principally from the Panhandle Eastern Pipe Line." [11] (Emphasis added.)

Thus, the cases have uniformly maintained the distinction between interstate and intrastate commerce which Congress adopted in explicit statutory language characterized in its committee reports as "self-explanatory." Where the gas stream was transported in part of an interstate pipeline system but consisted only of gas produced, transported and sold solely within one State, it has been held a matter for State regulation and beyond the statutory authority granted this Commission. Our jurisdiction has been affirmed by the courts *only* where the gas stream at the time and place of regulation included gas flowing

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[11] This case is in principle identical to the *Deep South* case (see Part V, *infra*)—since the gas stream included substantial interstate volumes and there was no attempt or means to identify the fluctuating intrastate portion, the court was forced to treat the entire volume as interstate. Thus, the case is in direct contrast to the instant case (where *all* the gas involved in the disputed sales is positively identified as intrastate), rather than "almost directly in point" as stated by the majority (Mimeo p. 9).

"between any point in a State and any point outside thereof." The majority's quotation of general language from these cases affirming jurisdiction can hardly justify a decision not contemplated by those courts, specifically rejected by other courts and expressly prohibited by the legislative history and the statutory language.

V. Regulation of This Gas When Produced

The majority assumes that the sales to United by the producers of this gas have been regulated by the Commission,[12] and from that argues that the gas was and continues to be in interstate commerce (Mimeo p. 6). An understanding of a fundamental factual distinction compels rejection of this argument.

[853]

It is true that in the *Deep South* case, *supra*, the court *treated* the sales of gas by the producers as in interstate commerce even though the stream included an unspecified and unidentified amount to be consumed within the State.[13] However, this result was compelled by one reason, and one reason only—the gas stream was composed of substantial portions of gas destined beyond the State, and since there was no attempt and no means to identify the intrastate portion, the court had to *treat* the entire stream as interstate.

That situation is to be directly contrasted with the case

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[12] The facts pertaining to the sales by the producers were not developed in the record but can be assumed arguendo as herein stated.

[13] The Supreme Court in *Phillips Petroleum Corp.* v. *Wisconsin*, 347 U.S. 672 (1954), assumed that *all* of the gas involved was resold outside the producing State. See 347 U.S. at 675. Thus, it did not deal with the situation presented here, and the majority's statement that "the Court was apparently untroubled by the fact that some of the purchasing pipelines resold the gas bought from Phillips within the state in which it was purchased" is based on an erroneous "fact."

in which the intrastate gas is specified and identified. The *State of North Dakota* case, *supra,* involved precisely the same facts as *Deep South* with the one exception that the intrastate portion of gas feeding into the interstate pipeline was identified by the producers. Under such circumstances the court held that the sales of the intrastate portion were not in interstate commerce and were non-jurisdictional. See p. 8, *supra.*[14]

In the instant case the initial sales of gas *by the producers* include large volumes destined beyond the State, as well as the intrastate gas. Since there is no attempt or means to identify the intrastate portion, the Commission justifiably has *treated* the entire volume of gas sold by the producers as interstate. However, in the sales *by United* now in dispute, all of the gas involved is unquestionably identifiable and identified as exclusively intrastate. Each cubic foot is known to be gas produced, transported and sold solely within Louisiana. Therefore, the necessity no longer exists for treating this portion as interstate gas. For the majority to continue to do so violates without justification the explicit statutory language, the manifest intent of Congress and he uniform holding of the courts.

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VI. "Impact" on United's System

The majority finally attempts to bolster its jurisdictional expansion by pointing to an alleged adverse impact of State regulation of these sales and to the "fully integrated" nature of United's system. Each can be disposed of in short order.

There is simply no basis in the facts for the majority's finding that the disputed sales have an adverse, substantial impact upon the national interest in commere, or upon the effectiveness of Commission regulation, or upon any

[14] The Commission's attempt in *Lo Vaca Gathering Co.,* 26 FPC 606 (1961), to overrule the 8th Circuit's decision in *State of North Dakota* is interestingly cited by the majority as authoritative (Mimeo p. 6).

other matter of proper concern to this Commission. Certainly, the record of the one-day hearing in this case is barren of evidence showing any such impact on any such matters. In fact, no effort was made to explore the possibility of any impact, the question evidently not being considered important. See, e.g., Tr. 35, 36, 39, 138-139.

As to an impact on the national interest in commerce, presumably the important effect would be the rate impact. The majority points to differences between certain of United's intrastate rates prescribed by the Louisiana Commission and interstate rates prescribed by the Federal Power Commission. But the Federal Power Commission in prescribing interstate rates follows definite allocation-of-costs principles [15] which insure that the interstate rates bear their fair share of system costs and no more. These principles the Commission applies on the basis of its own judgment, without necessarily regarding any allegations of United or the Louisiana Commission respecting what they may consider to be the proper allocation of costs to intrastate sales.

Thus, the short, clear answer to the majority's unsupported speculation is that the Natural Gas Act now unquestionably permits jurisdictional companies to engage in non-jurisdictional operations and provides the mechanics for isolating them. These non-jurisdictional operations include not only intrastate sales for resale—such as the ones here in issue—but also direct industrial sales, sales of extracted liquids, sales of oil produced in association with gas by integrated pipelines, etc. If and when this Commission finds such non-jurisdictional operations adversely

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[15] Applied in *Atlantic Seaboard Corporation*, 11 FPC 43 (1952), and frequently applied since. See the Commission's 1954 *United* opinion cited by the majority in footnote 2; and see Op. No. 387 in *American Louisiana Pipe Line Co., et al.*, issued May 16, 1963 in Docket Nos. G-18419, *et al.*, and cases there cited.

affect the prime beneficiary of the Natural Gas Act—the gas consumers—its duty will be to inform Congress and request a statutory amendment prohibiting them. However, such a finding has not been and could not be made here because of the total absence of record support and because proper application of cost allocation principles assures that jurisdictional customers pay only their fair share of system costs. The suggestion by the majority that costs from non-jurisdictional activities might be "reflected in higher interstate rates" (Mimeo p. 8) is totally without historical or legal foundation and will be disavowed and denied by the majority tomorrow if a regulated company seeks to justify a rate based on non-jurisdictional costs.

The majority further argues that United's sales in Louisiana may reduce the reserve and otherwise affect the quantities of gas available for out-of-state markets. Again, this basis for decision finds no support in the record.

There is no evidence whatsoever that the onshore Louisiana reserves supply ing these sales have been dedicated by United to the interstate market or have been relied upon by the Commission in approving United's expansions in the interstate market.

But even if these reserves had been dedicated, the appropriate and conventional action would be for the Commission to issue an order requiring United to obtain an abandonment certificate before using the reserves for non-jurisdictional sales. This procedure, which is regularly used by the Commission, reserves control in the Commission over dedicated reserves and completely protects the interstate market.[16] The theory of the majority—that "we might be powerless to prevent United from selling

[16] Section 7(b) of the Act provides:

"No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval

gas in the producing state even though, as here [sic], that gas has been dedicated to the interstate market by a certificate of public convenience and necessity and even though we relied upon the availability of that gas in authorizing sales for resale to customers in other states" (Mimeo p. 9)—is utter fiction contradicted by our regular practice. I can predict with confidence that it will be immediately dropped as soon as its genesis—this decision—is completed.

The majority's finding that United's disputed sales are "interdependent" with United's "fully integrated" system likewise is without substantial support in the facts or reasonable basis in the law. In practical effect, United's interstate and intrastate sales constitute separate businesses of one company. The Commission today effectively regulates United's interstate transportation and sales, as it has in the past, without concerning itself with the intrastate aspects of the company's business which are regulated by the State authorities. Indeed, Louisiana has been regulating substantially identical sales of United in its New Orleans Zone immediately adjacent to United's Jackson District without interfering with the effectiveness of Commission jurisdiction in the slightest. Similarly, the Commission regulates the interstate aspects of dozens of other natural gas companies while leaving the intrastate and other non-jurisdictional aspects to the States.

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of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."

It has been consistently construed to provide sufficient power in the Commission to protect jurisdictional customers. See *Panhandle Eastern Pipe Line Co.* v. *Michigan Consol. Gas Co.*, 177 F.2d 942 (6th Cir. 1949); *J. M. Huber Corp.* v. *F.P.C.*, 236 F.2d 550 (3d Cir 1956).

Although these sales are a part of United's overall business, as a practical matter they are only incidental to and are readily separable from it. On analysis it appears that the majority's "interdependence" or "fully integrated" factor, which the preceding discussion shows to be factually and legally without foundation. Thus, there is no basis either in fact or law for a holding that because one part of United's business is interstate, the intrastate portion thereof also becomes interstate, as the numerous authorities cited by the examiner also clearly show.

Conclusion

Manifestly, United's Lirette-Mobile sales are, under the law and on the facts, intrastate and not subject to Commission jurisdiction. How, then, shall we finally appraise the majority's contrary decision in this case?

It would seem that the majority's decision stems from a conviction that Commission regulation of United's sales, and all sales of their character, is desirable and necessary in that it would enable the most complete and thorough regulation of the natural gas industry possible by a federal agency whose power and resources far exceed those of any State agency, and would thus insure to the consumers of natural gas the ultimate degree of protection in all respects now and for the future.

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This objective, seemingly so laudable, is upon analysis subject to some very fundamental objections. First, it is not an objective permitted by the statute, which gives the Commission jurisdiction only over interstate and not intrastate commerce. Nor was it intended by Congress when it enacted the Natural Gas Act, for Congress specifically stated that Commission regulation under the Act was to supplement and not supplant State regulation. Further, it is not permitted by judicial decisions, which establish that these sales are intrastate.

Basically, this objective assumes that the scope of Commission jurisdiction under the Act is co-extensive with

this Commission's assessment of the need for consumer protection. This is not correct. Of course, as the Supreme Court has said, the primary aim of the Act is to protect the consumer. But jurisdiction does not depend on or follow consumer need; it is established by law, and remains as thus established until changed by the legal process available through Congress. Although the overall aim of the Act is to protect the consumer, the statute itself represents a recognition and accommodation of conflicting interests—the preservation of local regulation over local transactions, as opposed to pervasive federal regulation reaching constitutional limits; the opposing interests of the several segments of the industry; opposing economic and sectional interests. Fairness to all those affected by Commission regulation and faithfulness to law require that we adhere meticulously to the statute by which Congress through the elected representatives has seen fit to resolve the conflicting interests.

As stated recently by Commission Woodward in the *Montana-Dakota case,* Opinion No. 395 issued July 15, 1963:

> "We must ever keep in mind that the basic concept of our society is the rule of law—law exercised in conformity with constitutional principles and by democratic processes. Thus the Constitution provides for the division of power between the state and federal governments, and between the three branches—legislative, judicial, and executive—of the federal government. And Congress, acting under the Commerce Clause and by the democratic process through the people's elected representatives, provides laws, of which the Natural Gas Act is an example, designed to reconcile diverse and conflicting interests in our nation and society in the interest of the whole people. It is essential to the attainment of the

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> objectives of such legislation that the commands of Congress, and the courts' interpretations thereof, be vigorously obeyed. It is equally essential to the pres-

servation of our basic concepts, our constitutional system, and our democratic processes, and to the preservation of the public respect for law which is their indispensable foundation, that we do not permit either our desire for what we may deem high achievement, or our misgivings concerning the quality of others' achievements, to lead us to assert authority or exercise functions which a preponderance of the guiding considerations shows are not ours."

L. J. O'CONNOR, JR.,
Commissioner.

HAROLD C. WOODWARD,
Commissioner.

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Docket August 27, 1963, Docket Section,
Federal Power Commission

FEDERAL POWER COMMISSION
Washington 25, D. C.
August 27, 1963

DOCKET No. CP62-161

UNITED GAS PIPE LINE COMPANY

TO THE PARTY ADDRESSED:

The enclosed map (referred to on page 2) should be attached to Opinion No. 401 and Order issued August 26, 1963, following page 13.

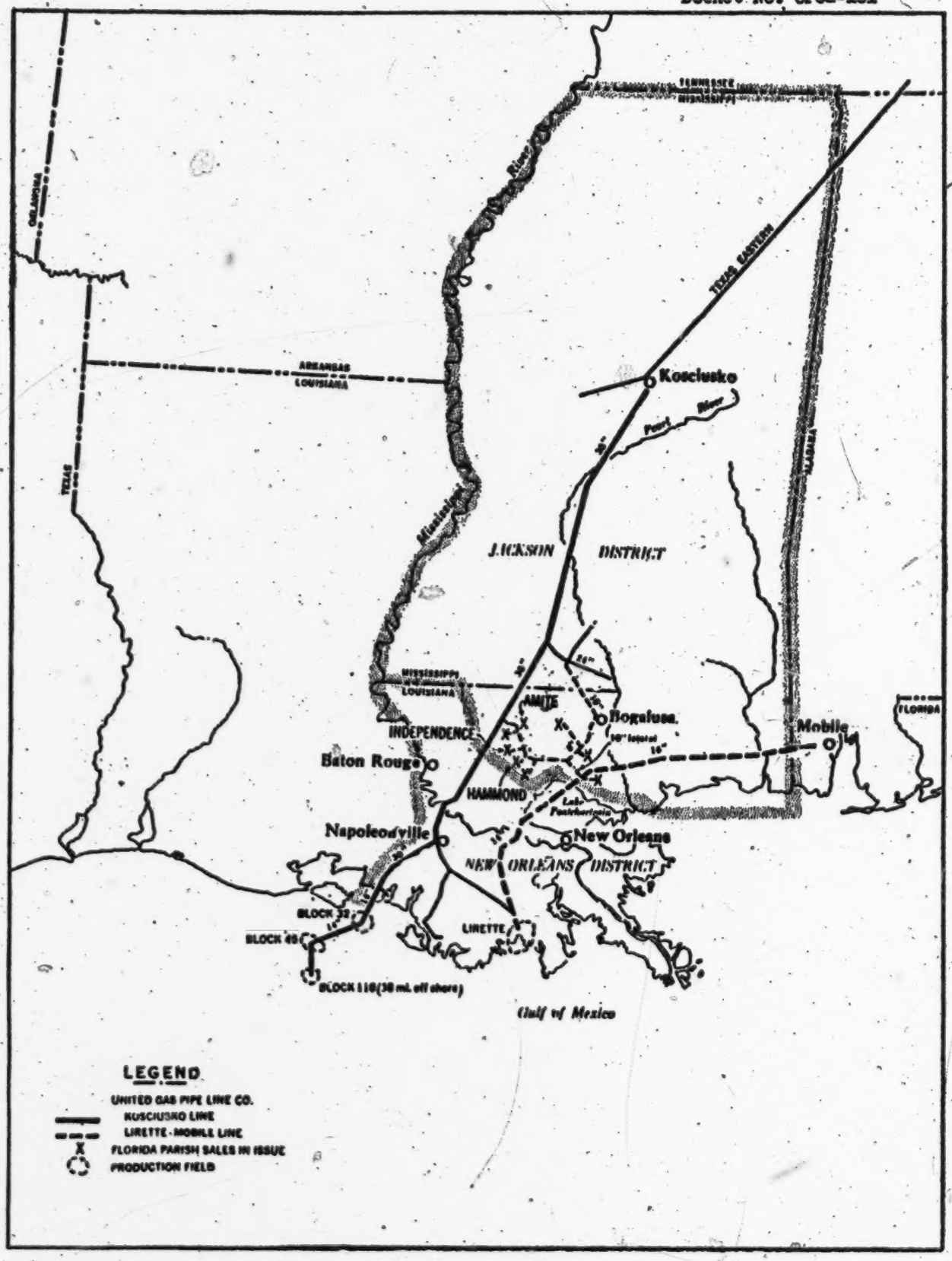
We regret that inadvertent omission from the copy of the opinion forwarded to you.

Very truly yours,

JOSEPH H. GUTRIDE,
Secretary.

Enclosure

Docket No. CP62-161



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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Joseph C. Swidler, Chairman; L. J. O'Connor, Jr., Charles R. Ross, Harold C. Woodward, and David S. Black.

DOCKET No. CP62-161

UNITED GAS PIPE LINE COMPANY

OPINION No. 401-A

OPINION AND ORDER DENYING REHEARING

(Issued May 11, 1964)

Ross, Commissioner:

Applications for rehearing have been filed herein by United Gas Pipe Line Company (United), Louisiana Gas Service Co., the Louisiana Public Service Commission, and by Hammond-Baton Rouge Brick Co., *et al.* These applications raise no new questions, and we adhere to our original conclusion.

The recently decided *Colton* case confirms our decision.[1] While the precise factual situation differs from that presented here, the Supreme Court's rationale was not premised on the particular circumstances of that case and is equally applicable to the instant case. In *Colton,* the

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[1] *F.P.C.* v. *So. Calif. Edison Co., et al.,* Nos. 71 and 73, decided March 2, 1964. The fact that this case involved the Federal Power Act is immaterial:

> "The Natural Gas Act grew out of the same judicial history as did the part of the Federal Power Act with which we are concerned; and § 201 (b) of the Power Act has its counterpart in § 1 (b) of the Gas Act. . . ." *Colton,* p. 6.

Court of Appeals had confined F.P.C. jurisdiction to those interstate wholesales constitutionally beyond the power of state regulation by force of the commerce clause of the Constitution. It expressly rejected the argument that § 201 of the Power Act incorporated a Congressional decision against deciding the F.P.C.'s jurisdiction by a case-by-case analysis. The lower Court thus employed a test which would bring under federal regulation only those sales of electric energy in interstate commerce at wholesale which had an impact upon the national interest.

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The Supreme Court reversed this holding. Reviewing earlier attempts to draw a satisfactory line between federal and state regulation, it referred to the series of cases which had emphasized the nature of state regulation, the objective of the state and the effect of the state regulation upon the national interest in the commerce. This line has now clearly been over thrown by the *Colton* case, for the Supreme Court re-emphasizes that the *Illinois* case [2] stands for the proposition that Congress denied states the power to regulate wholesale sales to local distribution companies.

Continuing, the Supreme Court pointed out that this conclusion was reaffirmed and sharpened in the *Panhandle* case.[3] In that case the Court held that "the line of the statute was thus clear and complete. It cut sharply and clearly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses; quantities or otherwise". (332 U.S. 517, quoted in *Colton, supra*)

In conclusion, the Supreme Court in *Colton*, in short but succinct language, cuts the Gordian knot very simply by stating:

> "Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis".

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[2] *Illinois Natural Gas Co.* v. *Central Ill. Public Service Co.*, 314 U.S. 498, 505, cited in *Colton, supra.*

[3] *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm.*, 332 U.S. 507.

Indeed it is manifest that Congress, in passing the Natural Gas and Power Acts, intended to resolve the confusion prevailing as to the extent of federal *vis a vis* state regulation. And the legislative history of the Gas Act makes it quite clear just where Congress drew the dividing line between what was interstate commerce and what was not.

The issue here is whether United needs a certificate under Section 7 of the Gas Act to make the instant sales, or whether the certificates heretofore granted should be vacated. Section 7 was significantly amended in 1942. The House Committee report states:

> "The bill when enacted will have the effect of giving the Commission an opportunity to scrutinize the financial setup, the adequacy of the gas reserves, the feasibility and adequacy of the proposed services [*i.e.*, proposed sales] and the characteristics of the rate structure in connection with the proposed construction or extension at a time when such
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> [953]
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> vital matters can readily be modified as the public interest may demand. Without such authority, the Commission may find itself confronted with a situation where it must either accept conditions which appear undesirable in the public interest, or require, subsequent to construction, changes which may have much more serious practical consequences than they would have had if they had been made before the public was asked to finance the enterprise.
>
> "The bill, as amended, eliminates the objections to the present section 7(c) above mentioned. *By this legislation, the present jurisdictional disputes are eliminated. . . .*"[4] (emphasis added)

Initially, the bill (H.R. 5249) contained a subsection (h) which was proposed by NARUC. This subsection would have given the states where gas was produced the power

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[4] House of Representatives Report No. 1290, 77th Congress, 1st Session.

to order intrastate expansion of the facilities of interstate pipelines. This section was made subject to the F.P.C. finding that interstate customers would not thereby be adversely affected. Even this limited grant of authority over interstate pipelines requested by the states failed to pass Congress. While the Committee report premised its rejection on its desire to devote further study to the matter, this action is consistent with the clear line Congress drew between federal and state regulation.

H.R. 4051, 80th Congress, 1st Session, (1947) was a comprehensive bill directed to amending the scope of the Commission's jurisdiction covering a wide range of its regulatory efforts with respect to gas companies. The Committee Report states that the bill would not alter the basic jurisdiction of the F.P.C. over interstate pipelines.[5]

Throughout the debate on the bill, it was assumed without exception that the Commission had jurisdiction from the moment the gas left the gathering lines and was injected into the interstate transmission system. To eliminate any confusion, Congressman Rizley who sponsored the bill prepared a chart which clearly delineated that jurisdiction which the Commission was initially granted and which it would retain under the bill. This chart is reproduced as Appendix A hereto.

In debating the bill, Mr. Harris declared:

> "When the Natural Gas Act was passed in 1938 it was understood that it was the intention of Congress that the jurisdiction of the Federal Power Commission should begin at the inlet of the trunk line in interstate commerce where the gathering from
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> [954]
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> production terminates and the gas goes into the trunk line, and end at the other end of the trunk line where it goes into the distributor line or facilities for resale to the consumer." (*Congressional Record*—House, July 11, 1947, p. 8741)

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[5] Report of House Committee on Interstate and Foreign Commerce No. 800, July 7, 1957.

Mr. Rizley similarly indicated:

> "The jurisdiction of the Federal Power Commission can only begin where the gas enters the interstate line and ends where it leaves the line." (*Congressional Record, supra,* p. 8748).

Congress again passed upon the scope of the Commission's jurisdiction in 1954 when the Hinshaw bill was passed. No attempt was made to carve out what Congress earlier considered to be the complete jurisdiction of the Commission over interstate facilities.

This legislative history is concerned with the overall scope of the Commission's jurisdiction under Section 7 and is not limited, as the minority erroneously asserts, solely to the F.P.C.'s jurisdiction over interstate facilities.

In the light of the foregoing, we are convinced that Congress intended us to exercise jurisdiction over wholesale sales from an interstate transmission system. A contrary decision would result in a regulatory chaos with respect to the sales in this area [6] certainly not the clear cut dichotomy envisioned by Congress and enforced by the Supreme Court.

The record in this case shows that 8 of the communities, on specific occasions, have received offshore gas, i.e., gas from a point out of the state. But such gas is received sporadically. The record further indicates that offishore gas travelled in the direction of most of the remaining 13 communities although they received no such gas on the few days when checks were made.[7] No reason exists why

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[6] Our original opinion stated that all 21 of the sales are to communities in the Jackson zone. Actually, four of the sales, *i.e.*, Doyle, Livingston, Port Vincent and Walker are in the New Orleans zone.

[7] United states we erred in finding that communities as far east as Slidell received offshore gas. We made no such finding. We simply were alluding to the testimony that such gas travelled toward Slidell, recognizing that the record does not indicate whether Slidell actually received offshore gas.

these communities could not receive offshore gas. Because of the automated nature of United's system, a slight change in either United's

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purchasing or sales pattern could result in offshore gas moving down the line beyond Independence to Natalbany, a matter of only some 6 miles. Hammond is only 3 miles further. Any failure in United's line connecting the Florida Parishes lateral to the Lirette-Mobile line would necessarily result in out-of-state gas serving all such communities. As the minority has correctly noted, the quantities of gas moving beyond Independence could not well be determined. It is likely some of these communities would only receive offshore gas a few weeks, a few days, or perhaps a few hours annually.

There is also the back-flow of Louisiana produced gas across the Mississippi-Louisiana border, *i.e.*, gas from a point outside the state. Here again, the record fails to disclose which communities receive "back-flow" gas or to what extent.

As stated above, Congress meant to resolve the uncertainties of jurisdiction in enacting the National Gas Act. It surely contemplated no situation where a certain sale would be subject to federal regulation one day and state regulation the next, depending on the vagaries of a pipeline's integrated system operations.[8]

Adoption of a variable jurisdictional theory would not be sound. These Louisiana communities could never be certain whether the intrastate rate of 24.85¢ or the present

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[8] United (apart from its physically separate intrastate operations) constitutes a fully integrated interstate pipeline transmission system. We appreciate that United's position here may be consistent with the 5 zone cost approach it advanced in its rate case Docket No. RP63-1. However, this Commission's extensive experience in considering various rate and certificate proceedings involving United compels a conclusion to the contrary. See the Examiner's decision in Docket No. RP63-1.

interstate rate of 33.7¢ would be applicable for any predictable period of time if federal jurisdiction were to be determined exclusively by the receipt of gas from a point outside the state under the transitory facts of United's operations. The location of industry as well as the economical development of commercial and residential sales would be impossible in such circumstances. The teachings of the Supreme Court in the X-20 case are particularly applicable to this situation.[9] There the Court stated that "where Congressional authority is not explicit [assuming *arguendo* this is the case], we must ask whether state authority can practically regulate in a given area and, if we find that it cannot, then we are impelled to decide that federal authority governs." (365 U.S. 19-20) Similarly the Supreme Court has held:

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> "Congress, by Sections 7(a) and (c) of the Act, has given primary authority to the Federal Power Commission to regulate extensions of gas transportation facilities and their physical connection with those of distributors, as well as the sale of gas to them. . . ." [10]

We emphasize that this case involves the sole question whether these sales by United are subject to the jurisdiction of the Commission. It does not involve the appropriate rate level of these sales which constitutes an entirely different question currently before us in Docket RP 63-1.

For these additional reasons, we believe our original decision was correct.

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[9] *F.P.C.* v. *Transcontinental Gas Corp.*, 365 U.S. 1.

[10] *Illinois Natural Gas Co.* v. *Public Service Co.*, 314 U.S. 498.

Accordingly, the Commission orders:

The applications for rehearing filed by United, Louisiana Gas Service Co., the Louisiana Public Service Commission, and by Hammand-Baton Rouge Brick Co., *et al.* are hereby denied.

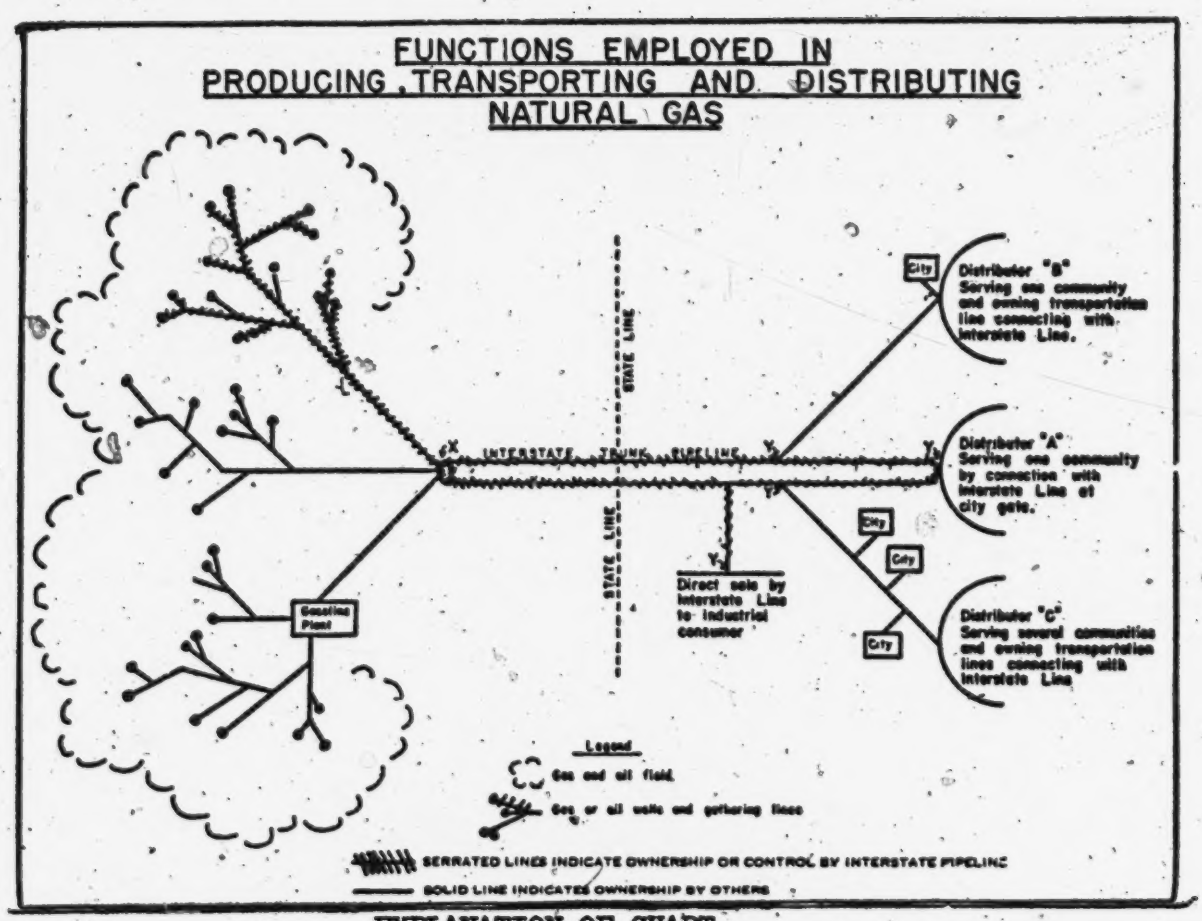
By the Commission.

Commissioners Woodward and O'Connor dissenting filed a separate statement appended hereto.

(Seal.)

JOSEPH H. GUTRIDE,
Secretary.

Docket No. CP62-161 Appendix A



EXPLANATION OF CHART

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Commencing at the point marked "X", the inlet of the interstate trunk pipe-line system, there is indicated by serrated lines a pipe-line system extending to points marked "Y". The system thus indicated consists of pipe lines, compressor stations, telephone lines and other facilities by which the gas entering the trunk pipe line at point X is transported to consuming markets. The Natural Gas Act of 1938 gave jurisdiction to the Federal Power Commission over operations between points X and Y; the Commission, however, has assumed jurisdiction of matters before X and beyond Y. This bill will again confine the jurisdiction of the Commission to operations between points X and Y. It is not intended by the bill to eliminate any of the Commission's jurisdiction over the transportation of gas from the point marked "X" to the points marked "Y" or the price received by the pipe-line company from sales to any of the distributing companies taking gas from such lines.

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(80th Congress, 1st Session, House of Representatives, Report No. 800, pages 4-5)

[958]

UNITED GAS PIPE LINE COMPANY

DOCKET NO. CP62-161

(Issued May 11, 1964)

WOODWARD, Commissioner and O'CONNOR, Commissioner, *dissenting:*

In this proceeding we are confronted with the sole question of the proper interpretation of Sections 1 (b) and 2 (7) of the Natural Gas Act.[1] While our dissenting statement to Opinion 401[2] is equally applicable here and need not be repeated, the instant denial of the applications for rehearing has so broadened the Congressional and judicially construed definition of "interstate commerce" that

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[1] Section 1 (b) of the Act provides:

> The provisions of this act shall apply to the transportion of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution or to the facilities used for such distribution or to the production or gathering of natural gas.

Section 2 (7) of the Act provides:

> "Interstate Commerce" means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

[2] Opinion 401 and Order reversing in part and adopting in part initial decision of presiding examiner determining jurisdictional issues, issued August 26, 1963.

additional rebuttal is required. The majority, apart from its legal errors, has distorted the facts basing its conclusions of fact and law upon unsupported assumptions and conjectured rationale. Their original error has been compounded and we fail to note any justification for their findings in the Natural Gas Act or in prior decisions of this Commission or the courts.

[959]

The majority errs in declaring that the original decision in Opinion 401 has been "confirmed" by the recent *Colton* opinion;[3] such reliance is absolutely without warrant and fails to meet the issue. Although recognizing that the "precise factual situation [in Colton] differs from that presented here,"[4] the majority avoids discussion of the significant distinction to which they allude. That "difference," we submit, strikes at the core of their argument and repudiates an erroneous conclusion. The Supreme Court's holding of jurisdiction was based on the finding that the Colton sale was in *interstate commerce*[5] because some of the energy for the sale was generated *outside* the State where the *sale was made.* Here, no such basis exists for finding United's Lirette-Mobile sales to be in interstate commerce since those sales involve gas which is *produced, transported* and *sold* wholly within the State of Louisiana. In short, the *Colton* decision does not establish a new principle of law and certainly not one which is determinative of the instant proceeding.

The majority's cryptic discussion of legislative history can be disposed of summarily. The statements from the House Committee report, as well as those attributed to Mr. Harris and Mr. Rizley simply confirm that, upon com-

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[3] *Federal Power Commission* v. *Southern California Edison Company,* et al., Nos. 71 and 73, decided March 2, 1964.

[4] Mimeo, P. 1.

[5] Emphasis supplied throughout this statement unless otherwise indicated.

pletion of production and gathering, Commission jurisdiction was to attach to all interstate transmission facilities. They add no support to a finding that *intrastate* sales off those facilities were also to fall within our jurisdiction.

[960]

Although the Presiding Examiner in his Initial Decision has correctly recognized that this case involves two classes of sales the majority persists in ignoring this controlling distinction creating the false impression that, generally, the Lirette-Mobile customers, at some time or other, do receive out-of-state gas as a result of some uncertain volume of back-flow or because offshore gas unexplainably enters United's line. There is an utter lack of compelling evidence in the record to establish that such gas does, in fact, reach those customers. The majority is forced to admit that most of the Florida Parish sales are exclusively of intrastate gas, although it attempts to obscure this fact by creating hypothetical possibilities unsupported by the record. Mere transportation of gas in an interstate facility does not impart to that gas, which is separated therefrom for consumption in the producing state, an unalterable interstate character.

The record does establish that the Lirette-Mobile sales are intrastate because, as a practical matter, neither gas nor sales have any real connection with any State but the State of Louisiana. Employment of speculative possibility cannot be considered as sufficient ground for holding jurisdictional that which is essentially non-jurisdictional.

In *Federal Power Commission* v. *Panhandle Eastern Pipeline Co.*, 337 U.S. 502-503, the Supreme Court stated, ". . . suffice it to say that the Natural Gas Act did not envisage Federal regulation of the entire natural gas field to the limit of constitutional power. Rather it contemplates the exercise of Federal power as specified in the Act . . ." The explicit terms of the Act exclude the Lirette-Mobile sales from Commission jurisdiction and serves to further emphasize that the majority's finding is without adequate basis in law.

Rehearing should be granted and that portion of Opinion 401 and Order, issued August 26, 1963, which asserts jurisdiction over sales by United from its Lirette-Mobile line should be reversed and set aside and the decision of the Presiding Examiner should be affirmed.

HAROLD C. WOODWARD,
Commissioner.

LAWRENCE J. O'CONNOR, JR.,
Commissioner.

(8693-4)